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EVIDENCE OF PARTIES IN CRIMINAL CASES.

After the complete success which has attended the great amendment of our procedure by the act for the examination of parties in civil causes, it was to be expected that Lord Brougham would take steps for rendering the measure complete, by extending it to criminal proceedings. He has accordingly presented a bill with this important view, which has been read a first time in the House of Lords; and, as time must be given for the full consideration of the subject, we deem it incumbent on us to take the earliest opportunity of laying it before our readers. How slowly legal improvement advances, and how fit it is that the greatest deliberation should be given to all proposals for a change in our long-established law of procedure, need not be stated. The best law-reformers are those who, being well acquainted with the existing system, from long experience at the bar or on the bench, unavoidably have contracted a habit of leaning against any alteration of it, and we ought only to complain of this reluctance when it is carried too far. Lord Denman has admitted in a letter, with which we had permission to adorn and improve our pages, * that as

* *Law Review*, vol. xiv., p. 351. The whole letter, and the two which precede it, are entitled to the most careful study of all friends to law amendment.

late as 1848 "his mind was inaccessible to the very idea of a change" in the rule excluding parties; although six years before he had himself carried the important act abolishing the objection of interest to a witness's competency —a change from which Lord Brougham justly observed, that his bill of 1845, afterwards passed (in 1851), was really a corollary. We may be sure that he will find the same reluctance to adopt this corollary to his own act; but we entertain sanguine expectations that, like the former repugnance, this obstruction will cease.

The Bill is extremely short and simple. It provides that in all prosecutions, the defendant, or the husband or wife of the defendant, may, if he please, be examined upon oath, subject to cross-examination by the prosecution; and it further provides that a witness, in any case whatever, shall have no right to refuse answering questions, upon the ground that his answer may tend to criminate him, but that the answer shall not be used against him, except upon an indictment for perjury assigned upon such answer. Into the discussion of the latter branch of the subject, self-crimination, we have entered upon former occasions, (see especially *Law Review*, vii. 19, and xviii. 178.) We propose now to deal with the former and more important branch of the measure.

That branch divides itself into two, as regards the objection likely to be urged against the proposed change; the one head regards the receiving the deposition of the party prosecuted; the other refers to his cross-examination by the prosecutor. Before entering upon either head of objection, it is fit that we call to mind the state of the existing law of procedure as regards both.

Nothing can be more wide of the truth than the statement that evidence of parties is excluded in criminal cases by the law as it now stands. On the contrary, that evidence is admitted in all or almost all such cases partially, and in a way to work great injustice, and to obstruct us in our attempts to arrive at the truth. The prosecutor is allowed to give his evidence in every case. No doubt this aberration from the rule of exclusion is supposed to be covered by the fiction that the crown is the prosecutor, and calls the party as its witness. But this pretence is put to flight by the bare mention of the word party. The real substantial prosecutor is the person injured, and who pre-

fers the bill before the grand jury, and pays the expense of the whole proceedings; or obtains, in the case of an individual, the aid of somebody to carry on these processes, he either belonging to that body, or having a common interest with it; or if the public prosecutes, and he is bound over, it is almost always because he is an injured party. In a few, and but a very few cases, the crown really prosecutes; and in most of these few cases there is scarce one so connected with the transactions out of which the proceeding has arisen, that he has all the prejudice against the accused, and all the desire to see him convicted under which a prosecutor, both really and nominally such, can be supposed to labor. But in the present discussion it is quite enough if we refer to the great number of cases in which there is a real party prosecuting in the name of the crown. Thus, a person is libelled, and proceeds by indictment or information against his adversary; he is suffered to tell his own story, and, among other things, to deny upon oath the truth of the matter alleged against his character. It was only by a late amendment of the law that the defendant was allowed to give the truth in evidence, but he still is not permitted to give his own testimony; and in many cases the facts are within the knowledge of none but the two parties. The law shuts the mouth of the one and allows the other to be fully heard; and the one whose mouth is closed might very possibly satisfy the court that he acted without motive, in circumstances showing the highest probability of the charge being true; or he may give such explanation as would rebut all suspicion of his bad faith. What is the consequence? He may indict the prosecutor for perjury, and then the tables are turned; his story is now heard, and his adversary's defence is shut out. They both might be convicted, one of the libel, the other of perjury; the cross-examination of the original prosecutor having led to the means of contradicting him when prosecuted, although it might have failed to discredit him when prosecutor.

But this, if the prosecutor be a competent witness, is not the only instance of parties examined in criminal cases. Persons standing in the position of defendants, are every day both allowed to give evidence for themselves and subjected compulsorily to cross-examination. The court of bankruptcy and the insolvent court exercise in reality large criminal jurisdiction; the former by refusing certificates

and protection, whereby the imprisonment of the party is, in most cases, rendered inevitable; the latter by direct condemnation to imprisonment as far even as for three years. Every bankrupt and every insolvent may, therefore, be regarded as in the position of a person upon his trial for a misdemeanor; and while all he has to urge in his own behalf is fully heard from himself, he is subjected to a searching cross-examination, or cross-examination at least which ought to be searching, respecting every point of his conduct which is the object of suspicion at first, and may become speedily, in the course of the investigation, the ground of a criminal charge. There is not a single reason that can be urged against the witnesses or defendants in any prosecution, which may not be urged against the whole proceedings in bankruptcy and insolvency, as far as the party's examination, the chief part of these proceedings, is concerned. Here, too, the cross-examination is compulsory; and, therefore, the measure proposed is free from a great part of the objection to which these proceedings are open, because it is not intended that the defendant shall be subject to cross-examination, unless he volunteers by tendering his evidence in his own behalf. We proceed to another instance of parties competent in criminal cases, and which more exactly resembles the proposed measure, because the accused volunteers his testimony.

In all motions for a criminal information the defendant is fully heard, and heard in the very worst possible way, upon affidavit. It is true that the question is not of his conviction or acquittal, but only whether or not he shall be put on his trial. But, besides that it is a most important part of the proceedings in all cases, every one knows how many never go beyond this first step; some, indeed, never can go further, as the motion for striking an attorney off the roll. When the motion is that he shall answer the matter in an affidavit, the court will not call upon him, if those matters are criminatory, upon the principle of preventing self-crimination; but they desire the motion to be changed into one for showing cause why he should not be struck off the roll, because then he is not bound to answer upon oath unless he please; and he is at full liberty, if he please, to give upon oath his entire defence against the charges made, which may be, and often are, of offences amounting to misdemeanors; but, at any rate, the issue is

the highly penal one, whether or not he shall be deprived of his professional existence.

The law which has now happily been introduced of making parties competent witnesses in all civil cases, really involves the receiving testimony of defendants in cases to all intents and purposes criminal. The form of the proceeding may be an action for damages; but the issue really is, in many cases, substantially criminal. It is whether the defendant shall be fined, and, if at all, how much, for having committed a grave offence against his neighbor. He may be charged with the foulest slander printed and published, with the most cruel and deliberate assault, with the most heartless plot or fraudulent devices to ruin a family, with a conspiracy to trick a trader out of his property, or a land-owner out of his estate, or a patentee out of his invention; and, in all these cases, if he is examined and not prosecuted, he is fully heard to defend himself against the accusation of violence trenching upon manslaughter, of calumny, of cheating, of forgery. What is the result? The party injured, or who asserts that he is injured, takes care not to proceed for compensation if his case is at all doubtful, because he would be defeated by his adversary's deposition; but he prosecutes, and is heard while his adversary's mouth is closed. Nay, incidental to the trial of many actions is the charge of fraud, and even of forgery. An ejectment is brought to try the title to a landed estate. The party in possession is charged with having obtained a will by foul means, amounting to fraud, and involving the moral guilt of forgery, and subornation of perjury; or the claimant is met by a charge of producing interpolated, that is, forged parish registers, or false entries in family bibles. Here the issue is really criminal; and on the question of his having committed forgery, as well as fraud, the party accused is heard in his own defence, and subject to cross-examination, exactly as the bill now before Parliament proposes that he should be, if the question of his guilt arose in a criminal prosecution. Nay, it may well happen (and in a late instance it did actually happen), that the party, after being heard as a witness in his own cause, may be prosecuted for the offence which he had denied upon the trial of the civil action; and yet, when he is tried for the felony, he cannot be heard to utter a word while the prosecutor tells his story.

It is thus manifest that, far from excluding the evidence of parties in criminal proceedings, and proceedings of a similar description, and raising the same objection to the admission of such evidence, our present law and practice admit the evidence of parties, but in such a manner as is altogether unequal to the parties, giving the prosecutor all advantages, and withholding all from the defendant. Even if it were impossible to put both upon the same footing, there would be some justice in excluding both from giving evidence, or in only hearing the one when the other was allowed to speak. But no one can doubt what must be the effect upon the prosecutor when he knows that his adversary's mouth is shut; no one can doubt that, if he knew he was to be followed by the defendant's deposition, he would in most cases give a different testimony.

Let it next be observed,—we refer to the assertion often made upon this subject,— that the defendant does give his account of the matter, and that therefore we cannot say his mouth is shut. No doubt he does, if he pleases, tell his story, as it is often called; but how? He is not sworn; and, what is often of more importance, he is not subject to cross-examination; hence what he says generally goes for little. But now and then it produces considerable effect; and if it owes much of this to the manner of the party, and generally to his demeanor, it owes a good deal more to his story being told without even the court sifting by cross-examination; and thus it often happens that too much influence is exerted by it upon the minds of the jury, which the proposed change in our procedure would prevent; because if any defendant renounced the benefit of the new law, and gave his unsworn and unsifted statement as under the old law, that statement would be of little weight.

Let us now ask if any reason can be assigned for hearing the parties where they are now competent — as the prosecutor in all cases, the bankrupt and the insolvent, the defendant in actions of tort, the party against whom a criminal information is moved for — any reason which may not equally be urged in favor of examining the defendant in all prosecutions, if he desires to be heard upon his oath and subject to cross-examination. Does not every reason given for refusing the deposition of the one apply with precisely the same force against admitting that of the other? But does not every such reason apply to the admission of

parties as witnesses in civil suits? The interest which they have was always urged, and for many long years successfully urged, as a sufficient ground of excluding their evidence altogether. They are under a bias to support their cause; therefore they cannot be believed, and there is no use in hearing them; such was the language triumphantly held; and yet we now know that it was wholly unfounded, have legislated in utter disregard of it, and find by the admission of those who held it that we acted wisely, and that all experience sanctions what has been done. The same argument is now used, the same language held by the same persons against hearing the defendant; and though the interest is greater, and therefore the objections may be somewhat stronger, in the case of the party criminally charged, the argument only differs in degree, for it is the selfsame in kind. Then let it be remembered,— and this removes all the diversity just remarked between the two cases, or at least makes the one as strong as the other: — while the exclusion continued in civil suits, there was no injustice done between the parties; both were excluded equally. But in criminal procedure the injustice is rank and glaring; one party always competent, the other always excluded; and it may well be deemed to be the wrong party; because, if any favor is to be shown, it ought rather to be towards the person accused; the more especially, seeing that, by the course of our procedure, the charge against him is prepared behind his back, by a kind of decision against him on an *ex parte* statement, and which, from the importance of those who produce it, has considerable weight though known to be *ex parte*.

We have hitherto been dealing with the objections likely to be urged against the change, rather than stating the reasons in its favor; but these are powerful, and they are unanswerable. The ground upon which parties in civil suits have been admitted exists here undeniably; the investigation of the fact, the ascertaining the truth, and preventing erroneous decisions, the object of all the proceedings, are incalculably assisted by the amendment proposed; and the greater importance of this, the more grievous consequences of misdecision in criminal than in civil cases, need not be stated, or need only to be mentioned, that all doubt may be removed. Let any one ask himself what he would most desire if falsely accused of an offence which he knew he

was incapable of committing. He will at once answer — "To meet my accuser, tell all I know of the matter, under the sanction of an oath or solemn affirmation, under the risk of punishment for perjury, and, above all, subjecting myself to the most rigorous and sifting cross-examination." One conscious of guilt will not expose himself to this test of innocence. But it may be said that declining to take the benefit of the new law, will always be regarded as a proof of guilt. It will never of course be held sufficient for conviction; but if it works in doubtful cases to cast the balance against the accused, there can be no reason to complain on behalf of justice; for the only result is that the guilty have not escaped. It is, however, alleged that persons of weak nerves, and deficient in presence of mind, may either be deterred from exposing themselves to examination, or, if examined, may appear to be guilty when they have only been confused. The former case is certain to be of rare occurrence; the supposition is of a person innocent, and yet afraid of being interrogated; the protection of counsel and of the court may, from the other circumstances, be relied on for his escaping the inference arising from his refusal. That protection may still be more surely trusted in the latter case, aided by the fact of the party having submitted to interrogation, as evincing the consciousness of innocence. That a guilty person should escape by his possessing audacity, ability, and possibly experience in former trials, appears next to impossible when the effects of cross-examination, and the exposure of the press, are taken into the account; and his own former trials are likely to weigh more against him, than his dexterity thus acquired can weigh in his favor.

Upon the whole, we feel confident that Lord Denman, had he happily been spared to adorn and elevate the profession and the legislature, would, to use his own words in 1851 (*Law Review*, xiv. 212), have given his adhesion to the principle of Lord Brougham's bill, and tendered his vote for its further "progress." It may truly be regarded as forming a corollary from his own memorable act of 1842, or at least from that of 1851.

Circuit Court of the United States. Vermont District.
May Term, 1858.

RUTLAND & BURLINGTON RAILROAD COMPANY *v.* WILLIAM A. CROCKER.

Two instruments between substantially the same parties, if made at the same time, and constituting the same transaction, may explain and control each other, although they do not in terms refer to each other.

The plaintiffs contracted, in writing, with the Taunton Locomotive Manufacturing Company for twelve locomotives to be delivered at certain specified times. On the same day the defendant, President of said Locomotive Company, subscribed for seventy shares in the plaintiffs' company, "payable in cash on the delivery of the last engine of twelve from the Taunton Locomotive Manufacturing Co."

Held that parol evidence was admissible to prove that these two contracts were parts of the same transaction; and if so, that the subscription was not payable until the last engine mentioned in said contract had been delivered. Delivery of any other twelve engines by said company would not be sufficient.

NELSON, J.—This action was brought to recover the amount and interest of a subscription of stock, 1 June, 1847, to the Champlain and Connecticut River R. R. Company, incorporated by the Legislature of Vermont. The name of the corporation was subsequently changed to that of the plaintiffs in this suit.

By the terms of the subscription the subscribers bound themselves to take the number of shares affixed to their names, and to pay for the same, according to several assessments from time to time, as ordered under the charter, and upon certain conditions particularly specified in the subscription paper.

The defendant's subscription was special for seventy shares, "payable in cash on delivery of the last engine of twelve from the Taunton Locomotive Manufactory." The shares were one hundred dollars each.

Evidence was given on the part of the plaintiffs, tending to show that the several conditions stated in the subscription paper had been complied with, and that the assessments upon the stock had been duly made, and notice given to the defendant—that all the requirements of the charter had been observed, and the road constructed.

In respect to the special condition annexed to the subscription of the defendant, the proof was that the Taunton Locomotive Company had delivered fourteen engines,

the last of which was delivered the latter part of September, 1851, and the twelfth on the last of February of the same year; that the engines were new, and manufactured at the Company's establishment; that Mr. W. W. Fairbanks was the general agent, and the defendant the president of the company.

The defendant, in the course of the trial, gave in evidence a vote of the directors of the plaintiff corporation, under date of the 4th June, 1847, approving of a contract made with the Taunton Locomotive Company for twelve engines: and offered in evidence the contract, bearing date the 1st June, 1847, and in connection therewith proposed to call said Fairbanks, the agent, to prove that this is the contract for the engines referred to in defendant's subscription, and that the whole number of engines had not been delivered.

But the court rejected the evidence, holding that the subscription was payable upon the delivery of any twelve engines by the Taunton Company.

After the fullest consideration I am satisfied the court erred in excluding this evidence. The terms of the clause annexed to the subscription import some previous agreement, or understanding, in respect to these engines, between the parties. The money was to be paid on the delivery of the last engine of twelve from the works of which the defendant was the head. There must have been an agreement for the delivery of twelve engines, and probably at some specified time or times, and especially some specified time within which the last was to have been delivered, as the payment of the money depended upon the delivery: for, if there was no specified time, either in fact or in contemplation of law, the subscription might have been rendered nugatory at the election of defendant. He could have postponed the delivery indefinitely. Again, as the event upon which the payment of the money was to be made, to wit, the delivery of the last of the twelve engines, depended upon the act of the defendant himself, unless there was some agreement binding him or his company to deliver the engines, not only the last one of the twelve, but each and all of them, the subscription would have been a contract wholly upon one side, as no obligation or duty would exist on the part of the defendant to deliver the engines, and the time of payment might, therefore, never happen.

In order to give the subscription any binding operation or effect against the defendant, it seems to us that the reference to the twelve engines, and the delivery of them, must be construed as relating to some contract between the parties providing for the manufacture or procurement of the same, previously entered into; and which, when produced, or proven, would explain the intent and meaning of the words. The court was misled, at the moment, on the trial, from a consideration of the difficulty of permitting parol evidence to connect the two instruments; and that the rule should be confined to papers explanatory of the transaction which on the face of them referred to one another. But the rule thus applied is manifestly too narrow. The paper is admissible, and relevant, if in point of fact it is a part of the same transaction, 2 Denio, 133. This principle is conclusive against the ruling upon the point in question. The evidence offered and rejected was full to make out not only the contract in respect to the engines, but also that it constituted a material element in the contract of subscription. It was made of even date with it, between substantially the same parties, and for the same number of engines: the price, time, and terms of delivery agreed upon, and approved by the directors of the railroad company, the plaintiffs, four days afterwards.

We should add that this seems to be the interpretation given to the clause in the subscription by the pleader in the declaration.

There are several other very important questions presented in the case, and which were argued by the counsel, but, as the case must go down for a new trial, we shall leave them for a more full consideration and further argument, as the facts may appear upon the second trial.

New trial granted, with *venire de novo;* costs to abide event.

E. R. Hoar and *E. H. Bennett*, for the defendant.

C. Lindsay and *E. J. Phelps*, for the plaintiffs.

Massachusetts District. May Term, 1857.

JAMES L. SMITH, APPELLANT, *v.* EDWARD JORDAN.

CHARLES HITCH ET AL *v.* THE SAME.

Where the District Court in fixing the quantum of damages for a marine tort has fairly exercised its judgment on no erroneous principle, and the amount is not plainly excessive, the decree will not be reversed because the Circuit Court, considering the case as *res integra*, might have come to a somewhat different conclusion.

The power of the master to disrate an officer or seaman is remedial and not penal, and does not authorize a degradation to the lowest place, if there is an intermediate office which the man may be supposed competent to fill.

Thus, where a cooper of a whale ship was discovered to be hardly competent for that responsible office, it was held that the master should have given him a trial as cooper's mate, before ordering him to work as foremast hand, and consequently that the refusal to obey such order was no justification for imprisonment.

CURTIS, J.—The first of these cases was an appeal by the respondent in a suit in admiralty, brought by the appellee in the District Court for several marine torts, on account of which that court pronounced for damages in the sum of four hundred and sixty-five dollars. The libellant shipped as cooper at New Bedford, in May, 1852, for a whaling voyage, on board the bark Cleora. He has pleaded that he was unlawfully put in irons and imprisoned in the after hold of the ship; that this imprisonment was continued for about the space of four months, during some part of which time, however, he was allowed to be on deck during the day; that it was accompanied by circumstances of degradation and cruelty; and that on the 17th day of January, 1854, he was forced on shore at Lahababoo, an island in the Pacific ocean inhabited only by savages, whence he made his escape, through the humanity of the master of a British vessel, which was there to procure some supplies.

The respondent admits that the libellant was unlawfully set on shore; but has attempted to justify the imprisonment on the ground that the libellant, being found indisposed to do his duty as cooper, was disrated, and ordered before the mast; that he refused to perform the duty of a foremast hand, and thereupon was imprisoned. In the second case, wherein the opinion will presently be stated, I have fully considered the question whether the master was justified in requiring the libellant to perform foremast hand's duty, and

having come to the conclusion that he was not, it necessarily follows that the measures resorted to to compel the libellant to do that duty were unjustifiable. It appears, upon this view of the case, and upon the admission of the respondent, that he unlawfully set the libellant on shore, and that this appeal involves a question of the quantum of damages due for aggravated marine torts. I have had several occasions to say, what I here repeat, that in such a case I cannot reverse the decree of the District Court, unless I can see that the damages are plainly excessive. No two minds would come to the same result upon such a question, viewed as *res integra*, and when the court of the first instance has fairly exercised its judgment upon no erroneous principle, it is not cause for reversing it, that, viewed as an original question, I might, and probably should, have come to a somewhat different result. In this case I am not dissatisfied with the amount of damages, and the decree is affirmed, with costs.

The second case is a cause of subtraction of wages. The lay of the libellant as cooper was to be one-fortieth. The District Court pronounced for wages, but did not allow that lay to the libellant. Both parties appealed. The case presents two principal questions.

First, whether the libellant was lawfully disrated, and if so, what deduction ought to be made from his lay by reason thereof.

It is admitted by the respondents that the libellant "was a fair cooper." I consider this to amount to an admission that he was competent in point of ability to do the duty for which he was engaged. It is pleaded by the respondents "that the libellant, after a fair trial of his abilities and disposition to do his duty as cooper, being found indisposed to do such duty, was disrated from the station of cooper, and ordered to do foremast hand's duty."

If a person contract to perform a particular service on shore, and prove incapable or negligent, the employer may dismiss him, but cannot require him to do other work not included in his contract. The necessities of the sea service have occasioned a different rule in the maritime law. The services of each of the crew are necessary, there being ordinarily no supernumeraries on board; and the master must keep and provision the men, and bring them home. Consequently when he removes one man from his station

for sufficient cause and promotes another to his place, the services of the man who is disrated are needed to supply the deficiency occasioned by such promotion; and as the man must continue on board, he is required by the maritime law to obey the lawful commands of the master and perform such work as he is capable of doing and as the master may assign him in the just exercise of his authority, and this rule of law may be properly said to qualify the express contract for service, by superadding to it the condition that, in case of inability or indisposition to perform it, the man will do such other service on board during the voyage as the master may properly assign to him.

The first inquiry in this case is whether the libellant after a fair trial was found indisposed to perform his contract.

The station of cooper on board a whale ship is one of much responsibility. Negligence in discharging its duties must inflict loss upon all concerned in the voyage, and may seriously impair, and even destroy, the fruits of the enterprise.

The large lay of one-fortieth, exceeding that of any other person on board, save the master and first and second officers, clearly indicates that skill and diligence of no ordinary character were contracted for.

The necessity for having this service well performed, and the difficulty of replacing the cooper in the course of the voyage, rendered it for the interest of the master, who was interested in the enterprise to the extent of one-twelfth, not to remove the cooper without adequate cause. The officers and crew have the same interest, though less in degree. Upon the evidence, I find that there was a general opinion among the officers that the libellant did not discharge his duties satisfactorily. There is evidence of two specific instances of neglect; but of these, two of the witnesses who speak of them admit that the oversight might have been made by any cooper.

On the other hand the conduct of the master towards this man evinces a strong personal dislike, which appears to have originated some time before he was disrated, and which was very unfavorable to a just and calm consideration of his case. Nor does he appear to have remonstrated with, or reproved him for any instance of neglect before he was disrated.

There is also a wide discrepancy as to the time when he was disrated, between the answer of the claimants and the answer of the master printed in the same record and the accounts of the making up of the voyage. The answer of the claimants seems to fix the 9th of February as the date, though its allegations are very loose and imperfect. The answer of the master says he was disrated on the 23d of July, while the accounts show the promotion of another man to the place of cooper on the sixth of April. It is the duty of the respondents to plead the cause for and the fact of disrating, with reasonable certainty, and to prove it as alleged, in all necessary particulars. The libellant having taken no exception, and both parties having gone into proofs on this appeal, I do not reject the allegation. But such uncertainty upon the point of time seriously enhances the difficulty of coming to a conclusion favorable to the respondents. It must be remembered, also, that, properly speaking, the displacement of a man from the position in which he contracted to serve, is a remedial, and not a penal act. The power is not conferred on the master so to punish for past offences, but to prevent future injury arising from neglect or incompetency, and therefore if it be found that the officer can no longer be entrusted with the duties of his place with safety to the interests involved, it does not follow that he is to be degraded to the lowest place possible. He must be removed from his post as far as may be necessary, but no further; and in this particular I am satisfied the master did wrong. I think upon all the evidence I cannot say the master was bound to retain the libellant in the place of cooper, with all the responsibility and control which belong to that place. But being a cooper of competent skill, as it is agreed he was, he should have been put into the subordinate place of cooper's mate, where he would have been under the supervision of the person promoted to his place, who could have taken care that his negligence occasioned no serious injury. It was urged that his fault being a want of disposition to do his duty, he could not be trusted at all; but it does not follow that occasional instances of neglect should necessarily destroy all confidence; and, at all events, I think the experiment of employing him under proper supervision should have been fairly tried. The power to take a mechanic from the work which he has contracted to do, and is able to do,

on ship-board, and put him to perform what, it is admitted in this case, he was very ill fitted for, is one to be used with much care and caution, and no further than shall appear to be necessary for the fair protection of the interests involved.

My opinion is that though the libellant's unsufficient performance of his duty as cooper should cause a proper deduction to be made from his wages from the date when another was promoted to his place, he should not have been deprived of the benefit of a fair trial in the place of cooper's mate, and consequently should receive the lay which appears by the ship's accounts to have been paid to the person who filled that place. Having made a computation, I find its result is the same sum allowed by the District Court, which, I infer, acted on the same rule I have adopted.

Let the decree of the District Court be affirmed, with six per cent. damages and costs.

L. F. Brigham, for the appellant.

C. M. Ellis, contra.

SAMUEL P. TUCKERMAN *v.* ABRAHAM O. BIGELOW ET AL.

A citizen of New Hampshire cannot maintain a suit in equity in the Circuit Court of the United States for the District of Massachusetts, against a citizen of Vermont, although another of the defendants be a citizen of Massachusetts.

CURTIS, J. — This case came before the court on a demurrer to the bill taken by one of the defendants, a citizen of New Hampshire, and which assigned for cause that he was not a proper party. On looking into the bill it was found that it was brought by a citizen of the State of Vermont against a citizen of the State of Massachusetts and two citizens of the State of New Hampshire. Upon a suggestion by the court to that effect, the question whether the court can exercise jurisdiction over the two citizens of New Hampshire in this suit by a citizen of the State of Vermont, has been argued by counsel.

The eleventh section of the judiciary act of 1789, 1 Sts. at Large 78, requires the suit to be between a citizen of the State where the suit is brought and a citizen of another State; consequently the complainant, a citizen of the State of Vermont, could not sue the two defendants, who are citizens of the State of New Hampshire, in this court, in the State of Massachusetts, and the fact that a

citizen of the State of Massachusetts is also joined with them as a defendant, does not enable this court to take jurisdiction over the citizens of New Hampshire. *Strawbridge* v. *Curtis and al,* 3 Cranch 267, has not been overruled, and the law requires each plaintiff to be competent to sue each defendant over whom the court is asked to exercise jurisdiction.

Nor has the first section of the act of February 28, 1839, 5 Sts. at Large 321, nor the 47th rule for the equity practice of the Circuit Courts, dispensed with this requirement. This act does not relate to persons who have been served with process, or who voluntarily appear in a suit. Its only purpose was to enable the court to proceed in certain cases, as between parties properly before it, and over whom the court had jurisdiction, although other parties might be out of the reach of process. It does not extend the jurisdiction of the court over parties not previously within its jurisdiction. *Commercial Bank of Vicksburg* v. *Slocumb,* 14 Pet. 60; *Shields* v. *Barrow,* 17 How. 141. And the same is true of the 47th rule; "This was only a declaration, for the convenience of practitioners and courts, of the effect of this act of Congress, and of the previous decisions of the Supreme Court on the subject of that rule." *Shields* v. *Barrow,* 17 How. 141.

I am of opinion the bill must be dismissed, as against the citizens of New Hampshire, for want of jurisdiction. Whether the subject matter of the bill is such that the court can proceed to a final decree, as between the complainant and the citizen of Massachusetts, without affecting the rights of the citizens of New Hampshire, or whether the citizen of Massachusetts is competent to represent those rights, the complainant must consider. If not, no decree can be made, and the bill must be dismissed as against the Massachusetts citizen, for want of necessary parties.

H. M. Parker, for complainant.

J. C. Dodge, contra.

SALEM & LOWELL RAILROAD COMPANY AND AL, PETITIONERS FOR A WRIT OF CERTIORARI, *v.* BOSTON & LOWELL RAILROAD COMPANY.

An application for a writ of *certiorari* to remove a cause from a State court to the Circuit Court of the United States, under the Act of Congress of March 2, 1833, 4 Sts. at Large 632, must state facts sufficient to enable the court to decide whether the case is one within the provisions of the act. It is not enough that the petitioner alleges in general terms that he intends to rely, in his defence to the suit, upon the revenue laws of the United States.

This was an application for a writ of *certiorari*, to remove to this court for trial the record of a cause pending in the Supreme Judicial Court of the Commonwealth of Massachusetts. The application was made under the act of March 2, 1833, (4 Sts. at Large 632.)

After alleging that a suit in equity had been brought and was pending in the State court against the petitioners as defendants, the application proceeded: "And the said defendants further represent, that in the defence of said suit or prosecution, they claim right, authority and title to do all the acts which have been done by them, and all the acts which they intend to do in the premises, under a revenue law of the United States of America, to wit, under the second section of an act of Congress, passed and approved by the President of the United States of America, on the seventh day of July, in the year eighteen hundred and thirty-eight, entitled 'An Act to establish certain post routes, and to discontinue others;' and under other revenue laws of the United States of America."

CURTIS, J. — The third section of this act provides in substance for the removal to this court of any suit or prosecution commenced in a State court against any person who asserts a justification or excuse for the act complained of, under the revenue laws of the United States.

The first step towards such a removal is the presentation of such a petition as is required by the act.

In enumerating the particulars which are to be contained in or are to accompany the petition, it is not expressly mentioned that the petition must show that the acts complained of in the suit or prosecution were done, or are asserted to have been done, under a revenue law of the United States. But as this is made by the act the essen-

tial cause for the removal, and is the only substantive ground, under the constitution of the United States, for transferring the case from a State court to a court of the United States; and as the object of requiring a petition is to show the grounds for such a removal, and the allowance of the writ of *certiorari* and the removal of the case are based, by the act, on the petition, it cannot be presumed that the act has failed to require this main and essential ground to be shown by the petition.

The mode in which the act of Congress has provided for this is in the requirement that the petition should set forth "the nature of the case." Having granted the right of removal in a case where the act complained of was done under or by color of the revenue laws of the United States, in other words, wherein there is a question to be tried whether a justification or excuse can be made out under those laws, and having provided for a petition to be filed showing "the nature of such suit or prosecution," the inference is that its nature must be shown, for the purpose of determining whether it be a case the removal of which is authorized. And if so, the petition must show a case of such a nature that there is to be tried in it a justification or excuse in some way arising under the revenue laws of the United States.

It must be added that the facts stated must show such a case. It is not enough that the petitioner should show that a certain suit or prosecution has been commenced against him, and then should allege that he intends to rely on some revenue law of the United States in his defence. He must so far exhibit the nature of the case, including not only the grounds of the claim or complaint, but of his defence thereto, that, upon the facts, it may appear that some material question may arise under those laws. Otherwise the petition would not state a case for removal, but only the request of the petitioner, and his opinion and that of his counsel that he had such a case. I do not think the just interpretation of the act authorizes a writ of *certiorari* upon such a statement of the mere opinion of the petitioner and his counsel.

In compliance with the requirement of the statute to state the nature of the case, facts, and not merely opinions or conclusions of law, should be set forth, so that it may appear whether in judgment of law such a case exists as enables the petitioner to call for a removal.

As was said by Chief Justice Marshall, in *Randolph* v. *Barbour*, 6 Wheat. 127: In summary proceedings, where a court exercises an extraordinary power, under a special statute prescribing its course, we think that course ought to be exactly observed, and those facts especially which give jurisdiction ought to appear, in order to show that its proceedings are *coram judice*.

Nor does the provision that this writ may be issued by the clerk, in vacation, show that such facts as in judgment of law are essential to make a case of jurisdiction, need not be stated in the petition. For though the clerk cannot exercise any part of the judicial power of the United States, and therefore cannot say with any conclusive effect whether a case is or is not made by the petition, yet whenever the court is next in session, a motion to quash the *certiorari* issued by the clerk, and remand the cause, because the petition does not show a case for removal, would bring the judgment of the court to operate on the petition and to decide whether it was sufficient. Besides, this argument that the petition need not state a case which in point of fact showed a defence under the revenue laws of the United States to be possible, in judgment of law, because in vacation the clerk is required to issue the writ, would exempt the petitioner from every requirement of the statute. Some judgment and discretion and knowledge of the law are necessary for the performance of the duty, to see that the petition contains what is required by the statute upon any construction which may be given to it. This is to be done by the clerk, if in vacation. If he does the act, he acts ministerially, and in subordination to the controlling power which the court exercises over the acts of all its officers. If the court does the act, it acts judicially and finally, subject only to appellate power. But whether one or the other allows the writ, the requirements of the statute must be complied with, whatever those requirements may be.

The case is this. A suit or prosecution has been rightly commenced and is pending in a court of a State; it is to be removed from that jurisdiction, and transferred to a court of the United States by an exercise of the supremacy of the constitution and laws of the United States. It is reasonable in itself, and is demanded by the long settled rules concerning similar cases, that the facts constituting a case or the exercise of that supremacy, under the constitution

and laws of the United States, should appear on the record as the basis of the jurisdiction. So it was held from the origin of our federal courts, even where suits were originally commenced therein; so it was required by the twelfth section of the judiciary act of 1789; and so I consider it is required by this act, when it says, "the nature of the case" must be set forth.

The petition now presented does not meet this requirement. It does not state any case which enables the court to see that its nature is such that the acts complained of were done, or alleged to be done, under any revenue law of the United States; or that its trial will, in any way, involve an adjudication upon any defence arising under one of those laws. It represents the opinion of the petitioners and their counsel, that the acts complained of were done under and by virtue of a particular law specified, and other revenue laws. If the acts complained of, and the other facts constituting the nature of the case, were exhibited, the court might or might not accord with the opinion expressed in the petition. But before it acts it must form its own opinion upon that question on which its jurisdiction depends, viz., whether this suit, the removal of which is prayed, is founded on anything done under the revenue laws of the United States, or under color thereof; and to form such opinion it must be possessed of the facts upon which that opinion is a conclusion of law.

For the reason that this petition shows no such case, its prayer must be denied. Nor is this merely a technical objection, one which, being disregarded, there is still matter enough on the face of the petition to enable the court to act upon its merits. In my opinion the question whether a law concerning the carriage of the mail is a revenue law, within the meaning of the act of 1833, now in question, cannot safely be determined upon a mere inspection of the law itself without knowing what are the particular facts upon which the question arises. I am not now prepared to say, that under no circumstances can a right or title be claimed under such a law, which would enable the defendant in a suit or prosecution to remove the case to this court for trial under the act of 1833; I must judge on each case as it arises, and to do so I must know what this act terms "the nature of the case." Petition dismissed.

G. Minot and *T. Wentworth*, for the petitioners.

R. Choate, contra.

Supreme Judicial Court of Maine. Penobscot County.

ISAAC M. BRAGG IN EQUITY *v.* EPHRAIM PAULK AND ALS.*

A bond for the payment of money, conditioned to be void on the conveyance of land, is treated in equity as an agreement to convey, and will be specifically enforced against the obligor.

When the grantee of such obligor takes a conveyance of the land thus agreed to be conveyed, with notice, he will be regarded as holding the same in trust for such obligee.

It seems that the assignees of an insolvent debtor, receiving a conveyance of his "right, title, and interest" in land of which he had previously given a bond to convey upon the performance of certain conditions therein expressed, will hold the estate conveyed, subject to the prior equities of the obligee in such bond.

The declaration of a trust may be contained in an indenture between parties, in the recitals of a deed, the conditions of a bond or other instrument under seal.

A declaration, in writing, under seal, that A has purchased a tract of land subject to mortgage for the joint and equal benefit of himself and B, that he has advanced the purchase money for and taken a conveyance to himself of the same as security for his advances and interest thereon, that he will apply all the profits of the same to the payment of his advances and of the mortgage on the land, and that upon payment of the same he will convey to B half of the land thus purchased, and equally divide with him the profits, if any, is a declaration of trust.

These facts appearing in the conditions of a bond between the parties constitute a declaration of trust, in which the obligor is *trustee* and the obligee the *cestui que trust.*

Such bond is a declaration of trust within the provisions of the Revised Statutes of Maine, c. 91, § 11.

By R. S. c. 91, § 33, it is to be recorded in the registry of deeds of the District where the land is, and the recording of it is made "equal to actual notice thereof to all persons claiming under a conveyance, attachment or execution made or levied after such recording."

The facts in this case will sufficiently appear in the opinion of the court, delivered by

APPLETON, J.—It is well settled that this court has power to decree the specific performance of a bond with a penalty. "Agreement to convey land may be enforced in chancery," remarks Parker, J., in *Newton* v. *Swazey,* 8 N. H. 12, "although it be secured by a penalty and be contained in the condition of a bond." The same doctrine has been fully affirmed in *Ensign* v. *Kellogg,* 4 Pick. 1. In *Dooley* v. *Watson,* 1 Gray 414, Shaw, C. J., in delivering the opinion of

* In view of the importance of the points involved in this case, and the length of time which must elapse before its appearance in the reports, we have made it one of the occasional exceptions to our general rule of not reporting in full, cases subsequently to appear elsewhere.

the court says, "Courts of equity have long since overruled the doctrine that a bond for the payment of money, conditioned to be void on the conveyance of land, is to be treated as a mere agreement to pay money; when the penalty appears to be intended merely as security for the performance of the agreement, the principal object of the parties will be carried out." "In application for the specific performance of agreements," says Caton, J., in *Broadwell* v. *Broadwell*, 1 Gilman 599, "it is immaterial what the form of the instrument is, whether it be a covenant in a penal bond with a condition to do the thing. The great and leading inquiry is, what did the parties expect would be done? what was the moving motive of the transaction? what is the real substance of the agreement and primary object of the parties? When that is ascertained, the court will enforce its execution." The form of the instrument by which the agreement of the parties is evidenced is wholly immaterial. "Thus if a contract only appears in the condition of a bond secured by a penalty, the court will act upon it as an agreement, and will not suffer the party to escape from a specific performance by offering to pay the penalty," 2 Story Eq. § 715, § 750.

In contracts of this description a trust is held to attach to the land, and to bind every subsequent vendee purchasing with notice of its existence, *Linscott* v. *Buck*, 33 Maine 530.

When a trust is in writing, the law requires no particular form of words by which it is to be proved. The letters, notes, and memoranda, in writing, of the party to be charged, and his answers to a bill in equity, have been regarded as affording sufficient foundation for the action of the court, *Buck* v. *Swazey*, 35 Maine 41, *Pratt* v. *Thornton*, 28 Maine 360.

The original purchase was made by the plaintiff and Paulk on joint account, the first payment having been advanced by the latter. But "if a joint purchase is made in the name of one of the purchasers, and the other pays or secures his share of the purchase money, he will be entitled to his share as a resulting trust," 2 Story Eq. § 1206; so when P bought land, and took a deed in the name of H, and H advanced the purchase money and took the notes of P for the same, and agreed to convey the land to P on being paid the money advanced, and interest, it was held that the money advanced by H might be regarded as a loan to P, and the

land as purchased with the money of P. so as to raise a resulting trust, *Page* v. *Page,* 8 N. H. 187. If real estate is purchased for partnership purposes and on partnership account, it is immaterial in the view of a court of equity in whose name the conveyance is taken, whether in the name of one partner or in that of all. In all these cases let the legal title be vested in whom it may, it is in equity deemed partnership property, and the partners are deemed *cestui que trusts* thereof. A purchase of property thus situated, with notice of the trust, takes it *cum onere* like any other purchaser of a trust estate, and is bound by the trust, 2 Story Eq. § 1206.

Trusts are either express or resulting by implication of law. The former must be proved by some written instrument, the latter need not be.

It is enacted by R. S., c. 91, § 11, that "there can be no trust concerning lands, except trusts arising or resulting by implication of law, unless *created* or *declared* by some writing signed by the party or his attorney."

The agreement by which the trust is established may be made before the purchase of the estate to which it attaches is made, as in *Quackenbush* v. *Leonard,* 9 Paige 334, where three individuals entered into a written agreement for the purchase of certain lots of land, the purchase money for which was advanced by one of the number to whom the conveyance of the same was made. It was then held that the conveyance when made was *in trust* for those beneficially interested in the agreement, and that a court of equity would enforce and protect the rights of the several parties to the original agreement.

But it is entirely immaterial whether the trust is evidenced by a writing made before or after the purchase. The written declaration of a trust, parol in its origin, is as valid as if its creation had been by writing.

In the present case the existence of the trust, and the price for which the property was purchased, and for whose benefit the purchase was made, are abundantly declared in the bond or contract signed by Paulk, the specific performance of which is sought to be enforced by this bill. The condition of the bond is as follows: "That whereas I have this day received from A. W. Babcock a deed of one-fourth part of seven undivided eighth parts of township No. one in the third Range west from the east line of the State, in the County

of Aroostook, said seven-eighths being subject to a mortgage from said Babcock, this day given to John Huckins, and I have paid said Babcock for such conveyance the sum of eleven hundred and seventy-three dollars: all which has been done by me for the equal benefit of myself and said Bragg. Now if said Bragg shall repay to me one-half of said sum so paid by me, with interest from this time, then I am to convey to him one-half part of said undivided fourth part of said seven-eighths of said township, subject to the said mortgage, by good quitclaim and free from incumbrances under me, to convey as good a title as I have received."

"All the stumpage received on said seven-eighths part of said township is to be appropriated to the payment of said mortgage; and after it is paid, to the payment of the money advanced by me as aforesaid, and interest so far as one quarter part is concerned, and necessary expenses to be paid by me, and the remainder received for such fourth part to be equally divided between said Bragg or assignees and myself. As soon as I shall from said stumpage, or otherwise, receive as aforesaid the sum due to me from said Bragg for his one-half of said fourth part, then I am to make a conveyance thereof, as aforesaid, to him or assigns."

The bill alleges, and the demurrer admits a performance by said Bragg, of all that was to be done and performed by him to entitle him to a conveyance.

Now there is no ambiguity in the language of the condition above recited. The joint interest of the parties in the original purchase, and that the obligor holds the estate for the joint and common benefit, are expressly declared. Language more clearly establishing the relation of trustee and *cestui qui trust* can hardly be imagined. Here is a clear and manifest recognition in writing, of a previously existing trust, but of one which could not have been enforced without such recognition, because its enforcement would be against the express words of the statute. Every fact necessary to create or establish a trust is precisely stated, the trust estate, for and on whose account, and when purchased, the purchase money of the same, and that it was advanced for the complainant, and that the land is held as security therefor, and the terms upon the performance of which the *cestui que trust* is to be entitled to a conveyance. All this is declared in writing, and, according to the entire weight of

authority in England and in this country, establishes a trust.

In *Dale* v. *Hamilton*, 2 Phill. 266, (22 Eng. Ch. Cond. 266,) Hamilton and McAdam having purchased jointly certain real estate, at the instance of the plaintiff, by a memorandum signed by themselves, but to which the plaintiff was not a party, stated therein the purchase to have been made by them jointly, and that the plaintiff was to have one third of the profits arising therefrom, instead of commissions for purchasing, selling, surveying, or laying out the land into lots, but that he was to have no power or authority over the land, and that he should have no compensation till the whole was sold and paid for. The land having risen greatly in value, Hamilton and McAdam refused to recognize the interest of Dale in the speculation. Upon a bill filed by Dale, in which he sought for a sale of the land, and for the protection of his rights, Lord Cottenham remarks as follows: "There is this distinction between agreements and declarations of trust: in the one, it is the agreement itself, which is the origin of the interest, that must be in writing; in the case of a declaration of trust, which is only the acknowledgment of a pre-existing interest, it is the evidence and recognition, and not the origin of the transaction, that must be in writing. Here the declaration recognizes a past transaction, because the purchase had been agreed for before Hamilton became entitled to any share in it; and in this agreement between Hamilton and McAdam, they recognize Dale's right to have one-third of the profit to be produced by the sale of the land, after paying the expenses and interest on the purchase money. Now it would be the strangest thing in the world if, the statute being satisfied, which it is by finding this writing signed by the parties, the court should not give relief to the party whom the document declares entitled to it. It is nothing that the plaintiff is no party to this declaration of trust; that is not required. A declaration of trust may acknowledge a right in another party, if it is signed by the party declaring that he is the trustee of another." So "if upon an agreement for joint purchase, the conveyance is taken in the names of some but not all of the intended purchasers, the interests of the others may be established by any subsequent writing signed by the fiduciary partners, and which acknowledges or proves the existence of the trust; and this, although the

agreement be that one purchaser shall find the money, and the other contribute his skill in purchasing and subsequently allotting and selling the land." Dart. on Vendors and Purchasers, 435.

In New York, by statute all trusts must be created or declared by deed or conveyance, in writing. This, it will be observed, is a material variation from our statute, which does not seem to require the creation or declaration of the trust to be by deed. In *Wright* v. *Douglass*, 3 Selden 564, Ruggles, C. J., in delivering his opinion, says: "The statute prescribes no particular form by which the trust is to be created or declared. Under our former statute in relation to this subject, it was only necessary that the trust should be manifested in writing; and therefore letters from the trustee declaring the trust were sufficient. Such is the law of England. Our present statute requires that the trust should be created or declared by deed or conveyance in writing, subscribed by the party creating or declaring the trust. But it need not be done in the form of a grant. A declaration of a trust is not a grant. It may be contained in the reciting part of a conveyance. Such a recital in an indenture is a solemn declaration of the existence of the facts recited; and if the trustee and *cestui que trust* are parties to the conveyance, the trust is as well and effectually declared in that form as in any other."

It is clear, therefore, that here is a written declaration of a trust, equally valid and binding as though the parties had entered into an agreement before the purchase was made, as in *Quackenbush* v. *Leonard*, 9 Paige 334. Indeed, where, as in the present case, money is advanced by one on account of another, and the deed taken to the person so advancing as security, it seems that the conveyance is held to be in trust for the person for whose benefit the purchase was made. "Should B advance the purchase money, but only on account of A, then A is the owner in equity, and B stands in the light of a creditor." Lewin on Trusts, 200.

The bond in and by which the trust between Paulk and Bragg is declared, was duly recorded before the conveyance of Paulk to the other defendants was made. "When such a trust is created or declared by an instrument in writing, the recording of it in the registry of the district where the land lies shall be considered equal to actual notice thereof to all persons claiming under a conveyance, attachment, or

execution, made or levied after such recording," R. S., c. 91, § 33.

As the other defendants purchased after the bond was recorded, they come in subject to the equities between Paulk and the plaintiff. 2 Story Eq. § 788.

Even if the bond were not to be regarded as an instrument to be recorded, still, according to the principles which govern courts of equity, the plaintiff would be entitled to a conveyance. That the plaintiff would be entitled, upon the facts set forth in the bill and admitted by the demurrer, to a decree for a conveyance from Paulk, is not to be questioned for a moment. The terms of the bond having been duly performed, the obligor is regarded in equity as the equitable owner of the land, and the vendor is deemed to stand seized for his benefit.

The conveyance to the defendants, Boynton and Bradley and Winn, was by deed of quitclaim, and for their security. In *Oliver* v. *Piatt*, 3 How. 333, the Supreme Court of the United States decided "that a purchaser by quitclaim, without any covenants of warranty, is not entitled to protection as a purchaser for a valuable consideration without notice, and he only takes what the vendor could lawfully convey." *Adams* v. *Cuddy*, 13 Pick. 460. A mortgage to secure prior indebtedness is not a purchaser for a valuable consideration in equity. *Dickerson* v. *Tillinghast*, 4 Paige 215. Still less can the other defendants, who hold the property as assignees and in trust for such creditors as may become parties to the assignment, be held entitled to protection. Their condition cannot be viewed in a more favorable light than that of their assignor, to whose rights only have they succeeded.

The defendants have paid no money upon the strength of their conveyance, they have parted with no property upon the faith of any apparent interest which Paulk has conveyed them. They received the property either in trust for creditors, or as indemnity against pre-existing liabilities, and they have no equities which should entitle them to a preference over the plaintiff. Their deed gave them the "right, title, and interest" of their grantor, and they can only be regarded as purchasers for a valuable consideration for such "right, title, and interest." *Bassett* v. *Norworthy*, 2 White and Tudor's Leading Cases in Equity, 65.

Demurrer overruled.

Tenney, C. J., Rice, Hathaway and Goodenow, J. J., concurred.

Supreme Judicial Court of Massachusetts. Cases decided at the sittings of the full court at Boston, in June, 1858.

Berkshire County.

COMMONWEALTH *v.* O'CONNELL.

Police Court — Power of justice of the peace to issue warrant — "Exclusive jurisdiction."

Wherever "exclusive jurisdiction" is given to a police court over certain enumerated or described offences, the authority of justices of the peace to receive complaints and to issue warrants returnable before that court against persons charged with those offences, is not thereby excluded, unless there is in the act establishing the court, or in a subsequent act, a superadded provision by which such authority is excluded, either expressly or by necessary implication.

The grant to such court of "exclusive jurisdiction," taken by itself alone, is a grant only of exclusive authority to try, or to examine and hold for trial, those who are charged with such offences.

The authority expressly given to a justice of the peace by Rev. Sts., c. 85, to issue warrants returnable before some other justice or court, can only be taken away by an explicit enactment.

C. N. Emerson, for defendant.

J. H. Clifford, for Commonwealth.

CRITTENDEN *v.* ROGERS.

Foreclosure of mortgage — Evidence.

Upon the question of the foreclosure of a mortgage, an unrecorded certificate of two witnesses, made before the Revised Statutes, is competent evidence, if supported by the testimony of the witnesses, that they at that date signed a paper, and saw an entry made to take possession, although they have no recollection of the contents of the paper, or of the truth of the facts therein stated.

B. Palmer and *J. E. Field*, for plaintiff.

I. Sumner, for defendant.

Powell *v.* Bagg.

Easement by adverse possession — Evidence of interruption.

The owner of land ordered off the owner of adjacent land and his servants, who were repairing an aqueduct on the land of the first, under claim of an easement in the aqueduct by an adverse possession. *Held,* that such verbal order, although unaccompanied by further acts, was admissible in evidence to show an interruption of the easement.

M. Wilcox, for plaintiff.

J. Rockwell, for defendant.

Washburn *v.* Cuddihy.

Crib-biting is unsoundness.

An action for breach of warranty of the soundness of a horse is supported by evidence that the horse was a crib-biter, and was thereby injuriously affected in his health and flesh, so as to be less able to perform work, and therefore of less value.

W. T. Filley, for plaintiff.

J. E. Field and *J. Price,* for defendant.

First Universalist Society in North Adams *v.* Fitch.

Bequest to charitable uses.

A testator made the following bequest: "I give and bequeathe unto the Universalist religious denomination in the County of Berkshire, the sum of one thousand dollars as a permanent fund, the use to be applied for the support of that denomination. This thousand dollars to be loaned on mortgage of real estate to double the amount exclusive of the buildings, and the use to be paid annually." *Held,* that this bequest was not void from uncertainty, but that the court would appoint trustees to apply the income according to their discretion for the use of organized Universalist Societies in Berkshire.

Hampshire County.

TIMOTHY *v.* WRIGHT.

Services rendered in procuring pardon—What agreement is valid—Escrow—Evidence of delivery.

An absolute undertaking to procure a pardon for a prisoner undergoing sentence, or to procure signatures to a petition for a pardon, is contrary to the policy of the law, and void, and services rendered under such agreement can constitute no consideration for a release executed by the prisoner.

But an undertaking to render such services as are necessary and proper in order to have the prisoner's application for a pardon fairly brought before the Governor and Council, would be valid. Such services are the preparing of the application or other papers having reference to that object, the circulating such papers for the free and voluntary signature of persons disposed to sign, care in transmitting the papers to the Governor, making usual and proper provisions to have the case fairly presented, and such other services of the same sort as the prisoner cannot personally perform.

It was represented to a prisoner that if he would promise to abstain from selling liquor, and would release a claim for damages against a certain party, people would be willing "to interest themselves" for him. A release was executed and deposited in the hands of a third party, to be delivered to the releasee if a pardon was obtained. *Held*, that this did not necessarily show an absolute agreement for the procurement of a pardon, but that the terms were to be found by the jury. If the agreement was valid, and the releasee performed his part, the prisoner had no power to revoke the release, and the contingency having happened on which the releasee was entitled to the delivery, if in fact the release was given to him by the depositary, or with his consent, then the jury would be authorized to infer a delivery according to the agreement, unless the evidence repelled such inference.

J. Wells, for plaintiff.

C. Delano, for defendant.

Hampden County.

COMMONWEALTH *v.* DODGE.

Indictment — District Attorney. Larceny — Peacocks — Animals not allegéd to be dead — Variance.

It is not necessary that it should appear on an indictment that the district attorney who certifies it is the attorney for the district in which it is found.

Peacocks are the subjects of larceny.

In an indictment for the larceny of animals not alleged to be dead, they are to be considered as alleged to be alive, and this rule has no exception in case of animals called by the same name, whether alive or dead. Such indictment is not supported by evidence that the animals were alive when taken in another State, but killed before being brought into this Commonwealth.

E. W. Bond, for defendant.

D. W. Alvord, for Commonwealth.

SMITH *v.* HILL.

Set-off—Purchase of claims—Policy of insolvent laws.

Defendant agreed with K., a merchant in embarrassed circumstances, to purchase his stock, on condition that the notes given for the purchase money should be placed in the hands of a third party in trust for the benefit of K's creditors. After this had been done, the defendant, knowing K to be insolvent and likely to go or be driven into insolvency, purchased the claims of sundry of his creditors and notified K thereof. K afterwards went into insolvency, and defendant claimed to set off the claims so purchased, against his notes in the hands of the plaintiff, as assignee. *Held,* that such set-off must be disallowed as contrary to the policy of the insolvent laws.

G. Walker and *W. L. Smith,* for plaintiff.

P. C. Bacon, for defendant.

WEBSTER *v.* MUNGER.

Price of spirituous liquors sold out of the state.

A sale of spirituous liquors in another State to a citizen of this Commonwealth, with knowledge or reasonable cause

to believe that they were to be resold by the purchaser in this Commonwealth, contrary to law, and made with a view to such resale, will not support an action for the price in this Commonwealth.

E. W. Bond, for plaintiff.

J. G. Allen, for defendant.

Worcester County.

COMMONWEALTH *v.* HOLDER.

Larceny, by bringing stolen goods into the state.

The bringing into this Commonwealth by the thief, of goods stolen in another of the United States, is settled by authority to be larceny in this Commonwealth. *Commonwealth* v. *Lord*, cited in 2 Mass. 16, 19, 23; *Commonwealth* v. *Cullins*, 1 Mass. 116; *Commonwealth* v. *Andrews*, 2 Mass. 14.

G. F. Verry, for defendant.

J. H. Clifford, for Commonwealth.

AMESBURY *v.* BOWDITCH MUTUAL FIRE INSURANCE CO.

By-Law of Mutual Insurance Co.—Limitation of action —Amendment.

A by-law of a mutual fire insurance company provided that "if the assured shall not acquiesce in the determination of the directors as to the liability of the company or the extent of the loss claimed, the claim may be submitted to referees, if both parties shall consent thereto: or the assured may, within four months after any such determination, but not after that time, bring an action at law against the company for the loss claimed; and if the plaintiff shall not recover before referees, or in his action at law, a greater sum than had been determined, the company shall recover their costs," &c. *Held*, that the limitation of time applied only to an action for the amount claimed, and not to an action for the amount determined by the directors; and that an action brought on the policy after the expiration of the four months, by the assured refusing to acquiesce in such determination, might be amended so as to declare for the amount determined.

P. C. Bacon and *D. Foster*, for plaintiff.

F. H. Dewey, for defendants.

GOODRICH *v.* INHABITANTS OF LUNENBURG.

Poll-tax.

One sixth of a State tax must be assessed on polls, although, taken with the town and county tax, it brings the poll-tax on each individual above one dollar and a half; and if the tax be not so assessed, the whole assessment is void.

C. Devens, Jr. and *G. F. Hoar*, for plaintiff.
N. Wood, for defendant.

Middlesex County.

DURELL *v.* HAYWARD.

Action — Removal of tombstone.

The mother of a deceased wife cannot maintain an action against the widowed husband for removing from the grave, without breaking it, a tombstone placed there by the mother.

J. Q. A. Griffin, for plaintiff.
M. G. Cobb, for defendant.

TIBBETTS *v.* GODING.

Slander — Colloquium.

A declaration in slander averred that on a certain day the plaintiff "was the owner of a certain building, to wit, an oakum mill, at Lowell, and that said building was insured against loss or damage by fire, and was consumed; and that thereafterwards the defendant publicly, falsely, and maliciously accused the plaintiff of wilfully and maliciously burning the said building, with intent to injure the insurers, by words spoken as follows: 'Tibbetts was seen in the engine room late in the afternoon before the fire, scattering oakum around the engine, by a man who looked through the cracks of the partition. I have no doubt about the burning of the mill; I think it was burnt by Tibbetts; Tibbetts burned the mill himself.' "

Held, that under the Practice Act, as well as before, this declaration was not sufficient without a *colloquium*, stating the circumstances under which the words were used, and showing that they were so used as to impute to the plaintiff a criminal offence.

B. F. Butler and *R. B. Caverly*, for plaintiff.
T. H. Sweetser, for defendant.

COLE *v.* RAYMOND.

Estoppel — Heir as executor.

An heir, who as executor and residuary legatee has given bond to pay the debts and legacies, is estopped, as well as all claiming under him, to claim land conveyed by his ancestor by deed of warranty.

B. F. Butler and *B. Russell*, for petitioners.

J. G. Abbott and *S. A. Brown*, for respondent.

HOWARD *v.* BRYANT.

Satisfaction of legacy. — Reduction to possession.

Legacy to a daughter, vested presently, but payable at a future period by testator's son, who was residuary legatee and principal devisee: *Held* satisfied by the effect of a deed from the testator's son to the husband of the legatee, of all the estate derived by the son under the will, which deed expressed that the husband should pay all the legacies which by the will the grantor was bound to pay.

A. V. Lynde, for plaintiff.

J. P. Converse, for defendant.

MARLBOROUGH BRANCH RAILROAD CO. *v.* ARNOLD.

Action against subscriber for stock, under R. S., ch. 39, § 53 — *Evidence.*

An action under Rev. Sts., ch. 39, § 53, to recover an unpaid balance of assessments on railroad shares, may be maintained against a subscriber for shares, on proof of his signature, without proof of the signatures of the other subscribers; it appearing that the subscription was in fact acted on by the corporation, though without any vote to that effect.

D. Thaxter, for plaintiffs.

G. Bemis, for defendant.

WAMESIT BANK *v.* BUTTRICK.

Practice — Exceptions in case of action against parties severally liable. (*Stat.* 1852, *ch.* 312, § 3.)

Where an action is brought in the Court of Common Pleas, under the third section of the Practice Act, against

parties severally liable on a promissory note, and the jury disagree as to one party, and render a verdict against the other, exceptions taken by the latter to the rulings against him at the trial, may be entered in the Supreme Court before disposing of the case in the Common Pleas as to the other.

D. S. Richardson, for plaintiff.

B. F. Butler, for defendant.

Barnstable County.

PHINNEY *v.* WATTS.

Riparian owner — Mill-pond.

When land is bounded upon an artificial pond, created by expanding a stream by means of a dam, the boundary is the thread of the stream.

J. M. Day, for plaintiff.

G. Marston, for defendant.

Bristol County.

COMMONWEALTH *v.* SOWLE.

Indictment for killing horses — "Wilfully and maliciously."

In an indictment for killing a horse, under Rev. Stat., ch. 126, § 39, it is sufficient to allege that the act was done "wilfully and maliciously," in the words of the statute, without fully setting out the manner, mode, or process, by which the killing was accomplished.

J. C. Blaisdell, for defendant.

J. H. Clifford, for Commonwealth.

LOBDELL *v.* ALLEN.

Apprentice — Indentures performed out of the Commonwealth.

Although an indenture of apprenticeship made here, to be performed out of the Commonwealth, is illegal, yet if after an indenture of apprenticeship is executed here by the master, the apprentice, and the father of the apprentice, the apprentice is taken, with the consent of all parties, into another State, and there continues to work, his father is liable upon his covenants in the indenture, in case the

apprentice subsequently leave the master's service in such other State.

E. H. Bennett, for plaintiff.

C. I. Reed, for defendant.

Norfolk County.

FISHER *v.* SMITH.

Boundary.

A deed of land bounded "easterly on the road or leading-way from my house to the old port road, so called," passes the land to the middle of the way, although a private way.

W. Colburn, for plaintiff.

E. Wilkinson, for defendant.

Essex County.

LANGLEY *v.* BOSTON AND MAINE RAILROAD CO.

Common carrier — Liability of railroad corporation leasing part of their road.

A railroad corporation, chartered by the laws of this Commonwealth, leasing a branch of their road to a railroad corporation out of the State, is still liable as common carrier for goods lost on that branch.

O. P. Lord and *R. Cross*, for plaintiff.

C. P. Judd, for defendants.

JEWETT *v.* JEWETT.

Executors' deeds executed more than a year after license. (*Stat.* 1840, *ch.* 97.) — "*Duly accounted for*" — *Legal disabilities — Remainder-man — Stat.* 1817, *ch.* 190.

Stat. 1840, ch. 97, provides, in certain cases, that where deeds of land sold by executors or administrators may not have been executed and delivered within the year from the date of the license, the sale shall nevertheless be held valid, provided the proceedings were regular, the price paid by a *bona fide* purchaser, and "duly accounted for." *Held*, that these words must be taken to mean, accounted for according to law in the Probate Court, and that an executor, who has neglected for thirty years to render an account, cannot show by parol how the money was applied.

A remainder-man during the estate of the tenant for life, having no seizin or right of entry, is within the exception of "persons under legal disabilities," in Stat. 1817, ch. 190, § 12.

J. P. Jones, for plaintiff.
J. A. Gillis, for defendant.

Suffolk County.

BANGS *v.* LINCOLN.

Manufacturing corporation — Liability of officers and stockholders cannot be proved against their estates in insolvency.

The individual liability of stockholders or officers of a manufacturing corporation, for the debts of the corporation, cannot be proved against the estates of such stockholders or officers in insolvency.

B. R. Curtis and *E. Bangs*, for plaintiff.
E. R. Hoar and *A. H. Fiske*, for defendants.

WHITTENTON MILLS *v.* UPTON.

Manufacturing corporation cannot form partnership with individuals.

A manufacturing corporation cannot form a partnership with an individual; and if they undertake to make such a contract, and act under it, and hold themselves out to third persons as such copartners for many years, and are put into insolvency as such copartners, the proceedings in insolvency will be superseded as to them, upon application to this court.

B. R. Curtis and *S. Bartlett*, for petitioners.
E. R. Hoar and *H. Gray, Jr.*, for respondents.

CITY OF BOSTON *v.* WORTHINGTON.

Effect of judgment against city in action for defect in street.

The plaintiffs had been sued for personal injuries alleged to have resulted from a defect in one of the streets of the city, existing upon land hired and occupied by the de-

fendants, and had given notice to the defendants to defend the action, which they did not do. That action resulted in a verdict and judgment for damages against the city, who now seek to recover the amount of the judgment and the expenses from the defendants. *Held*, that the verdict and judgment in that action were conclusive evidence in this action of everything then at issue, but not of the question whether the defect was one for which the defendants would be responsible.

G. S. Hillard and *J. P. Healy*, for plaintiffs.

R. Choate and *H. F. Durant*, for defendants.

Lewis *v.* Eagle Insurance Co.

Insurance — False but not fraudulent representation.

Under an answer to an action on a policy of insurance, alleging a false and fraudulent representation by the assured as to the value of the vessel insured, the defendants may prove a false representation, although not fraudulently made.

R. Choate and *I. W. Richardson*, for plaintiff.

E. D. Sohier and *C. W. Loring*, for defendants.

Otis *v.* Prince.

Devise — Construction — Restraint of marriage.

By a will of H. G. Otis, a certain estate was left to the plaintiff in fee. A codicil to said will contained the following provision.

"Item. I so far modify my devise in said will to my grandson, Harrison Gray Otis, Jr., that I direct the real estate therein devised for his benefit, to be held in trust by my said three sons, the survivors or survivor of them, and his heirs, in trust, to pay over to him quarterly the net income of said estate, deducting all expenses for repairs and insurance, so long as he shall remain unmarried, and in the event of his marriage, or dying unmarried, to convey the same to his legal heirs."

Held, that the meaning of the testator could not be discovered. There can be no heirs at marriage; and if the intention was to give an annuity so long as the annuitant remained unmarried, such limitation would be void, as against public policy. The trustees must pay over the an-

nuity to plaintiff. As the gift in fee in the will was "modified" by the codicil, the intention seems to have been that the heirs should have the estate after the life interest of the legatee.

H. Ritchie, for plaintiff.
W. Sohier, for defendant.

Atlantic Bank *v.* Merchants Bank.

Banking corporation — Knowledge of agent — Fraud.

Action for money had and received under the following circumstances. By a conspiracy between the teller of the Merchants Bank, the cashier of the Atlantic Bank, and a third party, $25,000 were drawn from the Atlantic Bank by means of a fraudulently certified check on the Merchants Bank, which sum was handed to the teller of the Merchants Bank, in order to enable him to conceal certain defalcations while his cash was counted, with the understanding that the next day after the counting the money was to be returned to the Atlantic Bank. No other officer of the Atlantic Bank had any knowledge of the transaction. The teller of the Merchants Bank committed suicide the next morning, and the money remained in that bank. The Atlantic Bank then presented the check and made a formal demand for the money; which was refused, on the ground that the teller of the Merchants Bank being largely indebted to the bank, it was immaterial whence he obtained the money with which he made good his account; that they received it in good faith, and for value.

Held, that the taking of the money from the Atlantic Bank for the purpose for which it was used, and intended to be used, was not within the scope of the cashier's authority, and consequently that the Atlantic Bank, never having in any way ratified the act, had never parted with their title in the abstracted funds.

That the Merchants Bank did not hold the money for value, or in good faith; the delivery by the teller to the president of the money to be counted, being in no sense a payment of his indebtment; and the bank having constructive notice of the fraud, on the principle that as a corporation can only act by agents, the knowledge of the agent is the knowledge of the corporation.

C. B. Goodrich and *W. R. P. Washburn*, for plaintiff.
R. Choate and *A. H. Fiske*, for defendant.

CASES IN MAINE.

Washington County.

Morse et al v. Machias Water Power and Mill Company.

Injunction.

A court of equity will interfere by injunction only on a clear right in the petitioner to the enjoyment of the subject in question, and an injurious interruption of that right.

If it shall appear to the court, upon the hearing for an injunction, that other parties than those named in the bill are interested legally or beneficially, the court may state the objection and refuse a decree; or if a decree is made, it may be reversed on a re-hearing or an appeal; or if not reversed, it will bind none but the parties to the suit and those claiming under them.

Walker and *Fessenden*, for plaintiffs.

Thacher, for defendants.

Stedman v. Vickery, and Trustees.

Atkins v. Same.

Trustee process.

A trustee having been charged on his disclosure, filed exceptions. At the next term he withdrew his exceptions, and moved for leave to answer further, which was allowed:

Held, that the right to answer further at a subsequent term is a matter entirely within the discretion of the court.

If a supposed trustee is in possession of goods of the principal debtor, as security for his liabilities, the plaintiff, if he wishes to avail himself of these goods, must obtain an "order and decree" of court, as provided by the Revised Statutes of 1841, ch. 119, sec. 58. If he neglect to take out such "order and decree," or to comply with its terms, he has no right to claim that the goods shall be exposed to the officer having the execution which may finally issue.

A conveyed certain property to B, the latter agreeing to apply the proceeds thereof to the discharge of certain debts of A, for which he was surety: *Held*, that this was a sufficient consideration for the conveyance.

A trustee is entitled to deduct from the property of the principal debtor in his possession, or from the proceeds, all sums which he has paid, and to hold the balance as security for all his outstanding liabilities, for the debtor.

F. A. Pike and *G. W. Dyer*, for plaintiffs.

T. Y. D. Fuller, for trustees.

KNOX *v.* CHALONER.

Dams on navigable streams—Nuisances—Adverse enjoyment.

The power given by the Revised Statutes of 1841, chap. 126, of erecting mills and mill-dams and flowing land, is subject to the paramount right of use in the public, where the streams in their natural state are capable of floating boats or logs.

All obstructions to navigation are public nuisances, unless directly authorized by the legislature.

When the legislature authorizes the erection of a dam over navigable waters, and it is so constructed as to impede navigation beyond the authority given, it is *pro tanto* a nuisance. So, also, where the river is not navigable in the strict common-law meaning of the word.

Though important rights may be acquired and lost by adverse enjoyment for more than twenty years, this principle does not apply to obstructions in a public navigable river.

A public nuisance is not legalized by length of time.

Walker, for plaintiff.

Lowell, for defendant.

Waldo County.

HART *v.* HARDY.

Specifications of defence.

Specifications for defence must be something more than general denials of the plaintiff's claim. They must show the grounds of defence distinctly and expressly, so that the plaintiff may be prepared for the suit, and not put to useless expense, otherwise the defendant will be defaulted.

Hubbard, for plaintiff.

J. G. Dickerson, for defendant.

Sagadahoc County.

COOMBS *v.* PURINTON.

Rights of foot passengers to the carriage way.

Foot passengers have the same right to the use of the carriage way in the street as to the sidewalk.

Walking in the carriage way, when there is a sidewalk, is not *prima facie* evidence of want of ordinary care; neither is negligence to be inferred from that fact alone.

Where an injury in the street results from negligence or want of care on both sides, no action for damages can be maintained by the party injured.

Simmons, for plaintiff.

Barrows, for defendant.

Lincoln County.

PATTERSON *v.* CREIGHTON.

Of town officers — Highway tax — Warrants, and surveyors.

The requirement of the Revised Statutes that certain town officers shall be "duly sworn" is substantially complied with by an oath that they will "faithfully and impartially perform the duties assigned them."

A highway tax must be deemed to be assessed by the assessors of the then current year.

"A list of the persons and the sums" to be delivered by assessors to highway surveyors, as required by the Revised Statutes, is not properly a warrant.

A highway surveyor must have previously complied with the requirements of the statute, before the list of deficient persons and the amount of their deficiency can be legally rendered to the assessors.

Such surveyor, it *seems*, is liable in damages for rendering such list, before he has given the notice and made the demand for labor on the highway, as required by law.

But if the list is not signed by him, it is in legal contemplation *no list;* the assessors derive no authority therefrom to assess a tax, and he is not liable.

Assessors are not personally liable to a party aggrieved, for a tax levied under a mistake of fact or law, without any want of "personal faithfulness or integrity on their part."

Ruggles and *Gould*, for plaintiff.

Ingalls, for defendant.

Cumberland County.

STATE *v.* MCKINZIE.

Indictments — Counterfeit bills.

Counterfeit bills upon a bank, alleged in an indictment to be "in the similitude of the bank bills" of the bank, should bear an external resemblance to those issued by the bank named in the indictment.

H. P. Derne, for state.

E. Gerry, for defendant.

Hancock County.

HINCKLEY *v.* INHABITANTS OF PENOBSCOT.

Indictment — Exception, in statute to be negatived — Burden of proof on defendants in such cases.

An indictment or complaint for an offence described by statute, with certain exceptions, must negative those exceptions. But the government, at the trial need not prove such negative averments.

If the defendant relies upon such exceptions in defence, it is incumbent upon him to bring his case within them.

B. W. Hinckley, for plaintiff.

C. J. Abbott, for defendant.

MARKS *v.* GRAY.

Probable cause for a prosecution — Payment to settle — Estoppel.

Probable cause for a prosecution is a question of law to be determined by the facts in evidence.

Where a case in court is settled by agreement, the defendant paying the plaintiff a certain sum, the defendant is thereby stopped from contending thereafter that there was no probable cause for the action.

B. W. Winkley, for plaintiff.

C. J. Abbott, for defendant.

Penobscot County.

MOOR *v.* CARY.

Deposition relating to lost papers — Genuineness of signature.

A deposition in reference to the contents of a lost paper in which the deponent testifies to the correctness of the

copy annexed to his deposition, and that he was acquainted with the handwriting of the person alleged to have signed the paper, is not admissible, unless the deponent also testifies to the genuineness of the signature, or unless it is proved *aliunde*.

An agreement by the parties to a suit to admit such deposition, is not a waiver of the necessary proof of the genuineness of the signature.

Blake, for plaintiff.

Kent, for defendant.

TEMPLE *v.* PARTRIDGE.

Estoppel — Incumbrance — Dower.

In an action for the recovery of damages, by reason of fraud committed by defendant in procuring title to lands for a price below the actual value, the defendant having taken a deed with full covenants of warranty from the plaintiff, and having conveyed said lands by similar warranty to a third party, he will not be allowed to show in defence, in contradiction of his covenants, that at the time of the conveyance from the plaintiff to him there were incumbrances on the lands; especially if no claim has been made on the lands, which if existing would constitute an incumbrance.

Evidence that a prior owner was seized at the time of the conveyance, and that at that time he had a wife, is not sufficient to establish an incumbrance upon the lands, without evidence that such wife would be entitled to dower therein.

A. W. Briggs, for plaintiff.

G. P. Sewall, for defendant.

PRESCOTT *v.* CURTIS ET ALS.

Complaint for flowage — Adverse right.

By the statute of 1840, ch. 126, it is not necessary to allege, in a complaint for flowage by a milldam, that the lands described were overflowed by the head of water made *necessary* to work the mills of the respondents; nor that they built their dam and mills on their own land, or on the land of others by consent.

To such complaint the respondents cannot plead that the complaintant's land was not overflowed by reason of the

head of water raised by the dam. Such defence must be first raised before the commissioners.

A prescriptive right to flow lands cannot be acquired unless it be shown that the complainant has sustained damages by the flowing.

A. Sanborn, for complainant.

A. H. Briggs, for respondents.

York County.

MOORE *v.* FALL.

Actions on lost notes.

A recovery may be had on a negotiable lost note, it having been specially endorsed to the plaintiff.

In an action on a lost note, if it appear at the trial that the limitation bar may be interposed to prevent recovery by a *bona fide* holder, the plaintiff may maintain his action without furnishing indemnity.

The defendant in an action on a lost note moved that the action be dismissed, unless the plaintiff tendered a bond of indemnity. *Held*, that having been properly commenced and legally pending, the court had no authority to dismiss it for such cause.

Clifford and *Moore*, for plaintiff.

E. and *S. Kimball* and *Weld*, for defendant.

LINCOLN ET ALS *v.* FITCH ET ALS.

Powers of bank receivers — Fraud.

The receivers of a bank have no rights paramount to those which the bank itself or its directors would have had, if the management of its affairs had remained under their control; and the appointment of the receivers does not affect the liabilities of other parties.

A draft having come into the possession of a bank fraudulently and without consideration, its exhibition as the property of the bank to persons who thereafter become creditors of the institution can have no effect upon the liability of the drawer and acceptor of the draft.

H. W. Paine, for plaintiffs.

Clifford and *N. D. Appleton*, for defendant.

Supreme Court of New York. General Term.

Before MITCHELL, CLERKE and DAVIES, Justices.

ABBOTT AND AL, *v.* ASPINWALL.

Under the act of 1852, ch. 228, § 9, any person who allows his name to appear on the books of the "corporation or association" as a stockholder is liable to the creditors of the company.

It seems that such subscriber, having acted as a stockholder, would be estopped from setting up that the company had no corporate existence owing to the fact that ten per cent. had never been paid in.

Under the above statute any stockholder may be sued alone by any creditor, whether the stockholder have paid his subscription to the company or not.

MITCHELL, J. — The defendant is sued as a stockholder in the Mexican Ocean Mail and Inland Company for a debt due by the company. The only question raised by the defendant's points are, 1st. Whether the defendant can be liable as a stockholder if ten per cent. of the capital stock had never been paid in; 2d. Whether he can be liable, he having once paid to the company (not a creditor) the amount of his subscription in full, while other stockholders who have not paid in full are not sued; 3d. Whether it was necessary to make all the stockholders parties to the action.

The company (if incorporated) was incorporated under the act of 1852, ch. 228. They filed in the proper offices the certificates required by the act — they went through the form of receiving from one Ramsay, as a subscriber, $1,400,000 in gold, at one of the banks in this city — about $80,000 in gold being brought from the vaults of the bank and placed on its counter and there delivered by Ramsay to an officer of the company, the company delivering it back to Ramsay in payment by the company for rights transferred by him to it, estimated at the total amount of his subscription — and then Ramsay delivered the $80,000 back to the bank. Such a contrivance may not have protected the company from the annulling of the franchise assumed by it in a proceeding instituted for this purpose by the State. But neither the company nor Ramsay could ever set up that the payment was not made in full both for the rights transferred by him and for his subscription, when the arrangement between them was contrived for the very purpose of complying, or appearing to

comply, with the law. As between them, it was a good payment, far exceeding ten per cent. on the whole capital, so also it would affect all stockholders who were not in some way defrauded by the contrivance. The defendant gave no proof that such was the case with him. He became a stockholder after this nominal payment was made, and acted at a meeting of stockholders when the president of the company read its minutes from its commencement to the day of the meeting, and explained its position. From this he probably must have known the nature of the payment made by Ramsay.

If we are to assume (as the referee finds) that the ten per cent. was not paid, then the defendant must maintain the position that one who is a subscriber to the stock of a company, and has appeared as such on its books, and has acted as a stockholder, cannot be liable to creditors if he can show that the company had not received ten per cent. of its capital from its subscribers, although the company has been in operation (as this company was) for more than a year.

The act of 1852 authorizes "any seven or more persons who may desire to form a company" for these purposes, to make, sign, acknowledge and file a certificate, stating among other things "the specific object for which the company shall be formed," and then declares (§ 2,) that "*when* the certificate shall have been filed as aforesaid, and ten per cent. of the capital named paid in, the persons, &c., shall be a body politic and corporate." The effect of this section is that when its two requirements are complied with, the certificates duly made and filed and the ten per cent. paid in, the associates become a body corporate, even as against the people, and are entitled to and possessed of the franchise of a corporation, as effectually as if it had been a grant from the State, and that on *quo warranto* by the State, they could set up and sustain their title.

It in no way alters the law as to the inability of third persons in certain cases to sustain the denial of the existence of a corporation. If this corporation had continued for ten or more years, and had during all that time exercised its franchise, and then it had been discovered that the certificate was not in due form, or had not been duly acknowledged, the State could raise the objection — but neither the company nor its stockholders, nor its debtors, could do so. The limitation in section 2 was made for the

benefit of the State, and not for the company or its stockholders. A different construction would defeat one great object of the act, which was to make "such persons as appear by the books of the corporation or association" to be stockholders, liable to the creditors of the association. (See section 9.) The expression "or association" may have been introduced to avoid the difficulty now raised; but whether it was so or not, the clause quoted holds out to creditors that all which they have to look to in order to ascertain who are liable, is the books of the association, and warns the stockholder that when he allows his name to be placed on their books he assumes a liability to the creditors of the company.

The general rules also have been that a person dealing with a company, which is in the use of its franchise, cannot set up that it has no corporate existence, either in consequence of acts which would cause forfeiture of its charter, or of the omission of acts which should have been performed before it could acquire a perfect title as against the State. In *McFarlan* v. *Triton Insurance Company*, (4 Denio, 372,) McFarlan had given his bond to the company, and, being sued under it, offered to prove, under the plea of *nul tiel corporation*, that the subscriptions to the capital stock were not taken in accordance with the act — that no money was paid to the commissioners by the subscribers, but that the commissioners gave credit. The company commenced its business and continued it for two years: there was evidence that the whole of the stock had been taken before the company was organized, but the report seems to imply that it was not paid for. Under the act, the company was not to commence business until the whole of the capital stock had been paid — or secured to be paid — and a deposition to that effect made and filed. Bronson, C. J., said, "Upon such proof there could be no doubt but that the plaintiffs were a corporation, so far as third persons are concerned. It is unnecessary to inquire what may be the rights of the people in relation to this corporation, or as against the individuals who were concerned in getting it up and setting it in motion. The defendant does not represent the sovereign power, and has nothing to do with the question whether the company should be dissolved. So long as the State does not interfere, the company may sue or do any other

lawful act, whatever sins may have been committed in bringing the body into existence." The doctrine of *Corning* v. *McCullough*, (1 Comst., 47,) is that the shareholders in these cases are liable not under the statute, but primarily as partners, with a protection against being sued until an execution is unsatisfied against the company. That would make it quite immaterial whether the company were duly incorporated or not — the statute only operating to enable each creditor to sue each stockholder to the extent of his stock, instead of suing all together.

The sixth section of the act recites that the shareholders shall be severally individually liable to the creditors of the corporation to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such corporation, until the amount of its capital stock shall have been paid in and a certificate made and recorded.

This makes each stockholder liable for the debts of the company, in his individual capacity, severally and not jointly with the others. It is not necessary, therefore, to join the other stockholders as defendants. The object is not to compel a *pro rata* contribution. To do that not only all solvent stockholders would be necessary defendants, but all creditors of the company would be necessary plaintiffs. Instead of that, each creditor has a remedy against each stockholder. In fact, as each stockholder is made "severally" liable, it does not appear that an action could be sustained against more than one, unless on behalf of all the creditors against all the stockholders, not under the act, but for the purpose of equitable contribution.

The remedy is not against such stockholders as have not paid for the stock, but is against "stockholders" without any such restriction; it is not to the extent of their unpaid subscriptions, but "to an amount equal to the amount of stock held by them respectively." "The stock held" gives the measure of the recovery, not the stock unpaid. As each is liable to the extent of the stock held by him, and this amount would vary with different persons, it also shows that the action was not to be joint but several.

The judgment for the plaintiff for the debt demanded, which was less than the stock held by the defendant, should be affirmed, with costs.

H. C. Van Vorst, for plaintiffs.

Varnum & Turney and *Wm. M. Evarts*, for defendant.

RECENT ENGLISH CASES.

Admiralty Instance Court.

THE DUCHESSE DE BRABANT.

Collision — Damage — Liability of bail.

In a cause of damage from collision, the bail of the vessel proceeded against is only liable to the extent of the value of the ship and freight, although the action may have been entered, and the bail given, in a larger sum.

Crown Cases reserved.

REG. *v.* LIGHT.

Assault on constable in execution of his duty.

If a constable sees an assault committed, he may, while the act is recent, and before all danger of further violence has ceased, apprehend the offender; and if, in so doing, he is resisted and assaulted, the person so assaulting is liable to be convicted of assaulting a constable in the execution of his duty.

REG. *v.* POOLE.

Larceny — Intent to deprive owner of his property.

In order to constitute larceny, the taking must be with intent to vest the property in the thief. Therefore, when servants employed by a glove maker as glove finishers, removed a quantity of finished gloves from one part of the master's premises to another, with intent to obtain payment for them as gloves finished by themselves: *Held* no larceny. Affirming *Reg.* v. *Holloway*, 1 Den. C. C. 370.

Reg. *v.* Essex.

Larceny — False pretences.

Indictment for stealing a check, the property of a manager of a Savings Bank. The proof was that the prisoner was clerk of the bank; and, according to the ordinary course of business, if a depositor wished to withdraw money, and could not conveniently attend at the proper time, a check was handed to the prisoner, as agent of the depositor. The prisoner falsely represented that a certain depositor wished to withdraw 50*l.*, and received a check for that amount to be handed to the depositor: *Held* false pretences and not larceny.

Reg. *v.* Watson.

False pretences — Obtaining money.

Where the prisoner, by false representations of the amount and character of his business, induced the prosecutor to enter into partnership with him, and to advance 500*l.* as part of the capital of the firm: *Held*, that a verdict for obtaining money under false pretences could not be maintained, the prosecutor having retained his interest in the partnership, and offered to dispose of it.

Common Bench.

Frazer *v.* Hatton.

Mercantile Marine Act — Ship's articles — Increased pay.

The plaintiff shipped as steward, for 3*l.* per month, on a voyage thus described: "from Liverpool to the west coast of Africa, to trade in any ports, bays, or rivers therein, and back to a final port of discharge in the United Kingdom, or for a term not to exceed three years."

Held, a sufficient description under the Mercantile Marine Act, 13 and 14 Vict., chap. 93, sec. 86, which requires that the articles shall state the nature, and, as far as possible, the length of the voyage or engagement on which the ship is to be employed.

The articles also contained the following stipulation: "The crew, if required, to be trans-shipped to any other ship in the same employ, and not to trade on their own

account." After serving on board of one of the defendant's ships, the plaintiff was trans-shipped to another vessel of the defendant, with a promise by the master to pay him 4*l.* per month for the remainder of the voyage, and new articles were signed accordingly.

Held, that the new promise was without consideration, and that the plaintiff could not recover wages at the increased rate.

CARPENTER *v.* PARKER.

A, the defendant, upon his marriage settled an estate upon himself for life, with remainders over, subject to a term of 1000 years, granted to trustees for the purpose of raising money by way of mortgage for the benefit of A. A power to lease was reserved to A, with the consent of the trustees.

The term was assigned by way of mortgage, to raise money for the defendant; and he afterwards demised a part of the estate to the plaintiff, but without the concurrence of the trustees, and covenanted that the plaintiff should quietly enjoy the demised premises "without the let, suit, trouble, denial, eviction, molestation or disturbance of the defendant, his heirs or assigns, or any person claiming or deriving, or to claim or derive title by, from, or under him or them, or any of them."

The interest of the money secured by the mortgage being in arrear, the mortgagees gave notice to the plaintiff to pay the rent to them, and not to the defendant. The plaintiff, by the advice of his solicitor, gave up possession, and the mortgagees entered.

Held, that there was a breach of the covenant for quiet enjoyment.

And that the mortgagees were persons claiming through or under the defendant, within the meaning of the covenant.

Queen's Bench.

LONDON DOCKS COMPANY *v.* SINNOTT.

Corporation contract, when to be under corporate seal.

A contract between an incorporated dock company and a scavenger, whereby the latter agrees to remove the dirt and

filth accumulating on the quays, &c., for a certain price per annum, will not be valid and binding on the company unless made under the seal of the corporation.

Court of Appeal in Chancery.

KING *v.* KING.

Trustees and cestuis que trusts. Appointment by father to son — Undue influence — Caution of trustees in requiring direction of court, whether proper or vexatious — Costs.

Appeal from so much of the decision of *V. C. Stuart,* (reported 30 L. T. Rep. 113) directing certain transfers of trust fund to be made by defendants, as ordered the costs to be borne by the plaintiffs.

One of the plaintiffs had exercised a power of appointment of a trust fund in favor of his son, subject to his life estate, and called upon the trustees to transfer the funds into their joint names. The trustees' counsel gave an opinion, that under certain conditions this might safely be done without suit. These conditions were complied with, but the trustees refused to make the transfer.

Held, by TURNER, L. J., that where there were suspicions of the father's designs (the transactions having been commenced before the son's majority, when the father requested a large transfer into his own name, and other suspicious circumstances having occurred) the trustees were entitled, not only to have all the requisitions on their part complied with, but also, where they act *bona fide,* and without any imputation of improper motives, to have evidence of their caution preserved, which could only be done by suit, of which they would be entitled to costs.

By KNIGHT BRUCE, L. J. That after compliance with the requisitions of their counsel, the trustees ought, under the circumstances, to have executed the transfer without suit, and were not entitled to their costs. The appeal was dismissed, without costs.

In re Russell's Patent.

Patent—Invention claimed by two parties—Patent granted on terms.

Where a patent was applied for by an employer, and opposed by his workman, each claiming the invention, and the evidence tended to show that they invented the improvement together, neither being the sole originator, it was held that the employer was entitled to the patent on the terms of signing a paper to be approved by the court, making himself a trustee of the patent, jointly for himself and the workman; the patent being liable, in the first instance, to pay all costs which the employer was put to in obtaining it, which it seems will include the costs of the application by the employer to remove the restriction obtained by the workman.

Where a matter is much in doubt, the court will put the party opposing to the costs of opposing ulterior proceedings, rather than withhold the Great Seal from the letters patent in the first instance; the one creating a remediable, and the other an irremediable injury.

Randfield *v.* Randfield.

Devise — Construction — Gift over.

Devise of real estate to testator's son, when he should attain the age of twenty-one, subject to an annuity to testator's widow. Then followed a gift of personalty to the son. But if the "hand of death should fall on widow and son," and testator left no other children, or son any issue, then, should son leave a widow, she should receive an annuity out of the real estate, the residue to be divided between certain parties named, they paying the son's debts, or testator's wife's should she be the longest liver.

Held, (reversing the decision of *V. C. Kindersley*) that the gift over was not void for obscurity, but took effect on the decease of the son without issue, leaving a widow.

NOTICES OF NEW PUBLICATIONS.

CASES SELECTED FROM THOSE HEARD AND DETERMINED IN THE VICE ADMIRALTY COURT for Lower Canada. Edited by GEORGE OKILL STUART, Esq., Q. C. London: V. & R. Stevens, and G. S. Norton, 26 Bell Yard, Lincoln's Inn. 1858.

VICE ADMIRALTY COURTS OF LOWER CANADA.

SOON after the cession of Canada to Great Britain, by the Treaty of Paris, in 1763, a Court of Vice-Admiralty was established for the Province of Quebec, (afterwards called Canada,) which has been continued by commissions to the present time. The Vice-Admirals are the respective Governors General, but the judge of the Vice-Admiralty Court usually receives his commission directly from the Crown, renewed on each demise of the Crown; and Victoria, by the Grace of God, Queen, &c., Defender of the Faith, &c., informing her well beloved Henry Black, Esquire, of her confidence in his ability and integrity, appoints him Commissioner and Judge of all Admiralty and Maritime causes in the Province, by letters patent given in the High Court of Admiralty in England, under the Great Seal thereof. The Judges of Admiralty have been, James Potts, from 1764 to 1768; Jonathan Sewell, (Attorney General and Judge of the Vice-Admiralty Court of the Province of Massachusetts,) 1768 to 1775; Peter Livius, 1775 to 1788; Isaac Ogden, 1788 to 1796; Jonathan Sewell, (son of the above named, and afterwards Chief Justice,) 1796 to 1797; James Kerr, 1797 to 1836; and Henry Black, the present Judge, beginning with 1836.

By the Act 2d William IV., the King in Council is authorized to make rules and regulations to govern the practice in all Vice Admiralty Courts in the Colonies and Provinces. Under this Act, His Majesty, William IV., in Council, June 27, 1832, approved and established a complete system of "Rules and Regulations to be observed in the several Courts of Vice Admiralty." The private history of this code of rules is, that it was originally drawn up by Messrs. James Farquhart, H. B. Swabey and William Rothery, then perused and approved by the distinguished Doctors of the Civil Law, Herbert Jenner, [First,] John Dodson, and Stephen Lushington, and then, together with separate tables of fees for the respective colonies and provinces, submitted to and approved by Sir Christopher Robinson, at that time the Judge of the High Court of Admiralty. This code, so scrutinized and approved and re-approved, is now in force in the Vice-Admiralty Courts of the British Dependencies.

Henry Black, Esq., a gentleman of legal learning, general culture, urbane manners and high integrity, has held the post of Judge of the Vice-Admiralty Court of Canada for over twenty years, and has lived to see the trade by the St. Lawrence attain to an average yearly tonnage of 618,926 tons; whereas, at the establishment of the court in 1764, it was only 5,496 tons. Mr. Black was made a Doctor of Laws by Harvard College some twelve years ago.

Many causes of Admiralty jurisdiction necessarily arise in the present state of commerce of the St. Lawrence, and, at length, there has appeared from the London press, printed in very handsome style, a volume of Admiralty Reports. This volume contains selected decisions of Judge Black from 1836 to 1855. It is edited by George Okill Stuart, Esq., Q. C.,

an eminent practitioner in all the courts of the Lower Province, as well as a leading member of the Canadian Parliament, in which he has often represented the City of Quebec. Mr. Stuart is also known as the editor of a volume of reports of the decisions of the King's Bench of Lower Canada, published many years since.

This volume of Admiralty Reports is well ordered and arranged, carefully indexed, and furnished with all the aids a good reporter can give. It also contains the Rules and Regulations of Vice-Admiralty Courts, above referred to. The causes reported are, of Collision, nineteen; of Salvage, five; of Wages, fifteen; of Personal Damage, three; of Mariners' Contract, five; of Practice, twelve; and a few under the heads of Lien, Possession, Jurisdiction, Evidence, &c.

The questions of pure law are met by the learned Judge with research, care and erudition, and his discretion, which in an Admiralty Judge is of great importance, seems to be exercised with great fairness and good sense. Aside from the causes of chief magnitude, we may remark that the cases relating to mariners' contracts and punishments bear witness to his independent and thorough vindication of the rights of humbler suitors in conflicts with merchants and masters, and to his parental solicitude for their welfare. At the same time, he is eminently a firm upholder of regulated authority. Causes of Collision seem to be very frequent within this jurisdiction, owing probably to the great length of the river navigation, with its tides and currents, being, leaving narrower sea-room than in large bays and sounds. We observe that the learned judge is in the habit of calling in the aid of men of nautical experience, to sit with him in collision causes, after the manner of the High Court of Admiralty in England. These assessors are sometimes distinguished officers of the Royal Navy, who are on the station, and sometimes the masters of the Trinity House of Quebec. Their opinions, often given in writing, are, of course, in no sense binding upon the court; but it is thought that they are not only valuable aids to the judge, in forming an opinion, but that the presence of men of known nautical skill operates as a salutary restraint on nautical witnesses.

The thanks of the profession in our commercial country are due to Mr. Stuart, for his contribution to this important and interesting branch of legal science.

The Practice in Courts of Justice in England and the United States. By Conway Robinson, of Richmond, Virginia. Vol. III. Treating of Personal Actions with respect to the Parties who may sue and be sued; the Form of Action; and the Frame of the Pleadings. pp. 680. Richmond: A. Morris, G. M. West.

We shall do, we are persuaded, a good service in calling the attention of the profession, and especially its members at the North, to this valuable treatise, which has now reached the third volume. The preceding volumes have been briefly and favorably noticed in this journal, but so far as we are aware the work has not been to any extent advertised or on sale in the northern and eastern cities. Hence it has not in this immediate region received that attention to which its very great merit and usefulness entitle it. We are free to say, we know no work of its character to be at all compared with it. The author has long enjoyed a position of great eminence at the Virginia bar, and in that State and throughout the South and Southwest this work is of high authority and enjoys a large and deserved popularity. Mr. Robinson is an excellent lawyer, trained and devoted to his profession—of liberal views, extensive reading, useful re-

search, marked ability, and brings to the preparation of these volumes, the discipline, knowledge and results of a general and active practice of many years in the highest courts of the State and country. As early as 1832, and in 1835, Mr. Robinson published a work upon "Practice," of a far less comprehensive and general character than that now before us. The editions of this work were exhausted some years before the publication of the first volume of the present. The desire of the author to meet the demand for a new edition, by "a work upon a plan to make it useful elsewhere as well as in Virginia," was for some time frustrated by his engagements as one of the two Commissioners to revise the statutes and prepare the new code of his native State, and subsequently, as legislator, in adapting the laws of the State to the new institution, which added to the demands of his constant practice upon his time and energies.

It was not therefore until 1854 that the first volume of the present work was published. This was followed by a second volume in 1855, and a third the present year, while a fourth is yet to come. The title to the work is unfortunate, and gives to a lawyer but an inadequate and imperfect idea of its value and character, and yet we do not know what other general title could be better employed. The term "Practice" would seem to limit the work to the discussion of the details of process and remedy, and such a work, comprehensive enough to embrace "Courts of Justice in England and the United States," and of sufficient accuracy and detail to be useful, would seem impossible, so diverse, variant, and inconsistent, and so much the provision of statutes, are the mere forms of remedy and their administration in the several States of our Union. Far different from what such a title might indicate is the work of Mr. Robinson. We should rather describe it as a series of connected and dependent essays, learned, able, elaborate, concise and full upon the whole "body of jurisprudence which relates to the subject of particular rights or wrongs" and "the principles which must come into view in every effort to apply the process of adjudication to a controversy." And we know of no three volumes, English or American, which contain an equal amount of information so accurate and useful, so well arranged and so ready at hand for the practising lawyer. The work is comprehensive in plan, systematic and clear in arrangement, minute in its divisions and sub-divisions, brief and simple in style, useful, thorough and full in the examination and collection of authorities, and accurate in the statement of results. The author uniformly endeavors to deduce from the cases exactly what the law upon a given subject now is, and to state it in the briefest and simplest form, accompanied by a copious citation of the decisions upon which it rests. Conflicting adjudications are often analyzed and reviewed, and uniformly with ability, judgment, and learning, but as uniformly with studious care to extract from them what the law is, rather than with any ambitious attempt to determine it merely by the author's own opinion.

Mr. Robinson divides his work into parts, titles, chapters, and sections or propositions. These, with the full and complete table of contents and indices of cases and subjects, make it easy of consultation and reference. We regret that we have no space for a full analysis of the contents. We can only say, in his arrangement the author pursues the somewhat natural order of inquiry. By what laws, or the laws of what place, are we to ascertain if rights exist; and by what laws, if they exist, are they to be enforced; and within what time may such rights arise, or be enforced? The answers to these inquiries make the subject matter of the first volume, which treats of the "place and time of a transaction or proceeding." In it are principally discussed the conflict of laws and the statutes of limitations.

Having thus shown by what laws rights are created, and within what time, and for what time they exist, the author proceeds to inquire what these rights are, or what transactions give rise to rights of personal actions. The second volume treats, therefore, of "the subject matter of personal actions; in other words, of the right of action." It is divided into five titles, and these are subdivided into eighty-one chapters. These titles will better than any abstract give the contents of this volume. They are,

1. The right of action on a sealed instrument, or upon a judgment or decree.
2. The right of action on bills of exchange, promissory notes, and other unsealed instruments.
3. Right of action on promises generally, express and implied.
4. Right of action by owner of goods or chattels against an adverse claimant, or against a bailee.
5. Right of action against a wrong-doer.

We subjoin the headings of a few chapters under the first title as illustrating the author's mode of discussing these several titles:—Chap. 1. What is a sealed instrument? Chap. 2. Of the delivery necessary to make the instrument a valid obligation. Chap. 3. What is deemed a part of the instrument; how it is affected by an alteration or addition. Chap. 4. On a sealed instrument, though without consideration, there may be a right of action when no illegality appears. Chap. 5. Of the right of action on covenants generally, express and implied; by what words created; how to be construed and performed. Chap. 6. Of conditions precedent; what performance by plaintiff must precede his action, &c., &c. Our space does not allow us to continue these extracts, and we have gone quite far enough to justify our remark that the term "Practice," as usually understood by legal writers, conveys no adequate idea of the work before us.

Having thus in these two volumes shown the State or country where laws are to decide the matter in controversy, and where proceedings are to be instituted to obtain such decision, the time at which a transaction may take place, or within which proceedings may be lawfully had, and what circumstances give a right to maintain a personal action, the author, in the third volume, whose title stands at the head of this notice, proceeds to the next step, and discusses "who are to be the parties to the action, what is to be its form, and what is generally in the declaration or complaint a sufficient statement of the cause thereof." This is to be followed by a fourth volume treating more in detail of pleading, and of the subsequent proceedings in an action to the trial. The last two volumes, it will be seen, when completed, will fall more appropriately under the head of Pleading or Practice.

We have spoken of this work as connected and dependent, and so it is; and yet the volumes are each so far distinct treatises, and so intended to be, that any one may be useful without the others. We would gladly give a more extended analysis of the contents of each if our limits permitted. We can only add, in their preparation and publication Mr. Robinson has not alone done a service, but an honor to the profession of which he is a member. We believe they will soon, if they have not already, take their place among the standard text books of the country. We are pleased to know that they have already received the commendation of several of the judges of the English courts, and we especially commend them to the examination of the bar of our own.

The work may be obtained at Messrs. Little, Brown & Co., of Boston, as well as of the publisher at Richmond.

Reports of Cases in Law and Equity, determined in the Supreme Judicial Court of Maine. By John Milton Adams, Reporter to the State. Maine Reports, Volume 41. Hallowell: Masters, Smith & Co. 1858. pp. 655.

The judgments of the highest court of Maine always command respect by their ability, and are of importance to all lawyers who wish to keep themselves informed of the progress of the law. But most especially to the bar of Massachusetts; for the similarity in statute and custom in these two States, arising from long political identity, is such, that scarcely any decision can be made in either, which is not found to have some bearing upon the law of the other; justifying thus the witty remark of an eminent advocate, that the jurisprudence of Maine realized the theory of Plato, and was, to a great extent, " a reminiscence of a former state."

This well printed volume, the first which has been edited by Mr. Adams, contains even more than the usual variety and number of cases, and reflects much credit on the editor, whose work is done with care, accuracy and good judgment. Space does not allow us to remark on any of the decisions contained in this volume, of several of which we have already published abstracts, furnished by the learned reporter, in advance of the full publication; but we commend the volume itself to the perusal of our readers.

INTELLIGENCE AND MISCELLANY.

[From the London Times of June 14, 1858.]

The Retirement of Mr. Justice Coleridge. — " It being well known that Mr. Justice Coleridge was this day sitting for the last time in this court, and that the Attorney-General in the course of the day would make a farewell address to his Lordship on the part of the bar, the court, as the day advanced, became densely crowded with barristers anxious to be present and to join in paying this token of respect to a judge who has for twenty-three years adorned the bench of this court. We recollect that when the present Lord Chief Justice of the Common Pleas took leave, on the part of the bar, of that most respected and beloved judge, Mr. Justice Patteson, the greatest interest was manifested, and feelings were excited to which dry lawyers might almost be supposed to be strangers. It might have been imagined that such a scene could hardly have been repeated; but like causes produce like effects, and on the present occasion the retirement of Mr. Justice Coleridge, equally admired and beloved for his sincere love of truth and justice, and courtesy to the bar, revived the interest and emotion experienced on the retirement of his Lordship's beloved and respected coadjutor, Mr. Justice Patteson.

Soon after 2 o'clock Lord Campbell called upon the Attorney-General.

The Attorney-General then rose, and with him the whole bar, who stood while the learned gentleman, in a style of elocution of which he is so great a master, spoke as follows: — May it please your Lordships, — Mr. Justice Coleridge, the moment has now arrived that I am called upon

to discharge the duty of attempting to express to your Lordship, in the name of the bar of England, the sentiments of regret with which they have learned that you are about to quit that station which you have so long occupied and adorned. Three-and-twenty years have now elapsed since your Lordship was raised, by the well-deserved favor of the Crown, to a seat upon that bench. Throughout that eventful period your public life has been distinguished by that dignified and sustained exercise of high judicial qualities which has rendered so many of your predecessors illustrious, and won for the administration of the law in this court the respect and confidence of the people. But, my lord, it is more especially to the members of the bar that your long and eminent judicial career has exhibited a bright example of the display of all those attributes which best become a judge in the discharge of his judicial duties. To a clear and powerful intellect — to legal and constitutional learning, at once accurate and profound — to patient assiduity and attention — your Lordship has also added the estimable and scarcely less important qualities of uniform courtesy, evenness of temper, and kindness of heart. My lord, we rejoice, in bidding you farewell — we rejoice that your country will not altogether be deprived of your invaluable services, and that your well-tried ability and experience may yet be called into action in the councils of the Queen. But, my lord, whether you shall continue to dedicate your efforts to the public good, or shall seek the enjoyment of that repose to which the labors of a long and useful life so well entitle you, be assured, my lord, that in your retirement from that bench you will carry with you the respect, the regard, and the esteem of every member of the bar, and their sincere and earnest wishes for your health, prosperity, and happiness.

Mr. Justice Coleridge was so much affected by this address that it was some time before he could overcome his emotion so as to find utterance. His Lordship requested the bar to be seated, and then spoke as follows: — Mr. Attorney-General and Gentlemen of the Bar, accept my heartfelt thanks for this most gratifying testimony of your regard. I wish I could feel that what has been said is as strictly just as it is abundantly kind. But, although this cannot be, I will not deny myself the pleasure of believing that, to some extent, I have earned the good opinion and affection of the bar. I should be ungrateful indeed if I doubted the sincerity of such a succession of kind testimonies as have attended me in every step of my career. This, gentlemen, the close of the whole, will be remembered by me as long as I live, and it is a great comfort to me at this trying moment— for, gentlemen, you can well believe that I am under the excitement of conflicting feelings. I have taken the resolution of retiring before I was compelled to do so by sickness, infirmity, or incapacity; and that step has not been hastily taken. Her Majesty has been pleased to summon me to her Privy Council, which will give me still some occasional judicial employment, and I do not think it right to shrink from any opportunity of being useful, according to my strength and ability; but still I look forward to simple rest, a desire not unnatural at my time of life, and after so many years of labor; and I contemplate a return to those pursuits which were the delight of my youth, but which I find to be incompatible with due attention to my profession. But with all these circumstances in my mind I may be excused for saying that it is a solemn thought that I shall find it difficult to give up the habits and break off the associations of nearly forty years, which I may find have become, as it were, a part of my very nature. It is a solemn thought that I have come to the end of my professional career, and that the responsibility of that

judicial career now rises up before me at a moment when no neglect of duty can be amended, and no breach of duty can be repaired. This moment, too, recalls that long list of associates with whom I have labored within these walls, and whom, in the course of nature, I must expect before long to follow. Gentlemen, I assure you it is a sad thought that I am to part with you. I well recollect with what misgiving I took my seat on this bench. I was told that favorable hopes were entertained of me, but I knew well how imperfect was my experience. False modesty would be out of place now, but I believe there are but few men to whom the judge's office does not present great difficulties. I felt them then, and I feel them now; but both at first and at last I felt that I could rely on the learning, industry, and ability of the bar. Nothing more lightened my labors than their uniform kindness. I very early learned that if a judge would be simple and patient, candid and considerate, and without respect of persons, he would reach every honest heart, and would be certain of such encouragement and co-operation from the bar as would lessen his difficulties and strengthen him to overcome them. With this conviction I have gone on, hopeful and rejoicing; and without being wholly deserving, and yet not wholly unworthy of it, I have always received kindness at your hands. I know not how I could have labored for so many years without it; and for that kindness I shall be deeply grateful as long as I live. It would argue a want of feeling to suppose that in so many years I have not given some just cause of offence. If, then, there be any one among you now present whom I have injured by word or look, by weariness or impatience, to him I now express my most sincere sorrow, and heartily desire his forgiveness. Gentlemen, I will not detain you with a single remark upon the greatness or importance of your profession. So long as England is rich and free the law must always exercise a predominant influence. I am sure you feel your responsibility is commensurate with your interest; and I have no fear but that, in any political difficulties or dangers that may arise, you will be found as your predecessors were, courageous and entirely equal to any crisis. But the most insidious dangers are those which beset you in your daily business — the excitement of controversy, the desire of victory, the love of intellectual display, and the excessive sense of duty to your clients. Gentlemen, and especially my younger friends, suffer me to put you on your guard. We can well afford to bear with broad pleasantries, but we cannot afford that our professional standard of honor should be questioned, or that it should be said that we would do as advocates in court what as gentlemen we should scorn to do. Sometimes we lend support to this notion by the ease with which we attribute ungentlemanly conduct to one another. That client is dear indeed that would induce an advocate in carrying out his views to go beyond his great and glorious profession. Forgive me, my friends, these free words. I speak in the love of a profession to which I have given the best part of my years, and which I shall continue to love as long as my heart shall beat. I have detained you too long, but I must not close without tendering my thanks to the Masters of the Court. The world knows little of their unostentatious services, but you know them, and the judges know them by daily experience, and I gladly seize this opportunity of thanking them for their conscientious discharge of their duties to the suitors. Nor can I leave without pronouncing my regard for those with whom I have so long occupied this bench. I have indeed been a happy man in my colleagues. Every member of the Court but myself has been changed. With those who have departed, as well as with those who have succeeded, I have lived in peace and harmony — loving and honoring

them, and I trust loved and honored by them, certainly guided and encouraged — with so much of general agreement as served to give authority to our judgments, but with so much occasional difference as showed our individual responsibility and independence. Thus employed in court, out of court we have lived in that easy and happy intercourse which sweetens the toils of office, and makes men more fit to be fellow-laborers. I may have said too much. My successor is known, and the undoubtedly wise choice leaves no cause for regret. I trust he may survive as long and happily, and more efficiently than I have; but I hope that in your happy meetings you will bear in mind that I do desire long to be remembered here. And now, Mr. Attorney-General, gentlemen of the bar, and Masters, my dear lord, and brethren, earnestly, gratefully, and affectionately I bid you all farewell, and may God bless you.

As soon as his Lordship had finished these words he bowed and hastily rushed out of court, evidently overcome with emotion. It is unnecessary to add that every one in court appeared deeply to sympathize with his Lordship, and many of them could not restrain their tears."

The Marriage Contract. — On first receiving our commission to the important office of Justice of the Peace we took down the book and proceeded at once to render ourselves thoroughly posted in our official duties in relation to this interesting subject. Not that we had reason to expect any great rush of business in that particular line, but because in the first place we realized our duty as a magistrate not to run the risk of impeding for a moment that "principle of reproduction" which the Pennsylvania judiciary regard with such veneration, and secondly, being very doubtful of our ability to acquit ourselves, if suddenly called upon, as well as did our brother magistrate of Ohio of whom we find the following anecdote recorded:

"In Butler county, the other day, a couple appeared before a newly appointed Justice of the Peace, and asked him to unite them. After some conversation, he requested them 'to stand up and join hands,' but, sad to relate, he had forgotten the ceremony, and neglected to take with him his book! After a pause of a few moments, the 'Squire broke the silence with the following questions: 'In the name of the Commonwealth of the State of Ohio, I———!' 'Know all men by these———!' 'Do you solemnly swear to take this woman to be your wife, to love, honor and obey her, to support the Constitution of the State of Ohio, and vote the Democratic Ticket?' The bewildered groom responded 'yes' and the 'Squire triumphantly pronounced them man and wife."

A New Attribute of Charity. — In the course of a trial, a year or so ago, in the county of Middlesex, the question arose as to the cause for a certain payment proved to have been made. The party making it claimed that it was not in discharge of any legal debt, but was simply an act of charity. It was however in evidence that a receipt was taken for the amount. "Gentlemen," exclaimed the opposite counsel, in the course of his argument, "it is claimed that this money was paid in charity. Now, gentlemen, we know all about charity. We read that charity vaunteth not herself — charity seeketh not her own — is not puffed up, and many other pleasing attributes. But among them all, gentlemen, we do not find it anywhere laid down, that *charity taketh a receipt.*"

INSOLVENTS IN MASSACHUSETTS.

Name of Insolvent.	Residence.	Commenceme't of Proceedings.	Name of Judge.
		1858.	
Abbott, Cheney	Holden,	June 21,	Wm. W. Rice.
Adams, Jotham, Jr.	Medway,	May 1,	Francis Hilliard.
Barnard, Andrew B. (1)	Worcester,	June 30,	Francis Hilliard.
Blake, Joseph H. D.	Braintree,	" 30,	Francis Hilliard.
Black, Amos R.	Worcester,	" 25,	Wm. W. Rice.
Blood, George (1)	Worcester,	" 28,	Wm. W. Rice.
Blount, William F.	Chatham,	" 26,	Joseph M. Day.
Bowles, Thomas (1)	Worcester,	" 28,	Wm. W. Rice.
Campbell, George (2)	Walpole,	May 7,	Francis Hilliard.
Campbell, Thomas	Wrentham,	" 7,	Francis Hilliard.
Cooper, Samuel	West Roxbury,	June 3,	Francis Hilliard.
Copeland, Alfred	Huntington,	" 29,	Samuel F. Lyman.
Curtice, Cyrus	Roxbury,	" 4,	Francis Hilliard.
Daniels, Willard	Medway,	May 4,	Francis Hilliard.
Drake, Jona. E. (3)	Mansfield,	April 30,	Francis Hilliard.
Estey, Eleazer W.	Greenwich,	June 8,	Samuel F. Lyman.
Estey, Samuel B.	Greenwich,	" 8,	Samuel F. Lyman.
Hall, Clement M.	West Roxbury,	May 15,	Francis Hilliard.
Higgins, David	Malden,	June 5,	L. J. Fletcher.
Hill, Luther	Spencer,	" 18,	Wm. W. Rice.
Holmes, R. G. (4)	Westboro'	" 24,	Wm. W. Rice.
Howard, Nicholas P.	Leominster,	" 17,	Wm. W. Rice.
Hubbard, S. B. (4)	Westboro'	" 24,	Wm. W. Rice.
Jones, William	Boston,	" 23,	Isaac Ames.
Lake, David	Topsfield,	" 4,	Henry B. Fernald.
Leonard, Charles	Foxboro',	May 19,	Francis Hilliard.
Leonard, Williams	Foxboro',	" 10,	Francis Hilliard.
Lincoln, William P.	Boston,	June 18,	Isaac Ames.
Lockwood, James C.	Saugus,	" 29,	Henry B. Fernald.
Lowe, John (5)	Fitchburg,	" 10,	Wm. W. Rice.
McKew, David	Dedham,	May 8,	Francis Hilliard.
Orcutt, Henry, Jr. Peck, George H. (2)	Brookline,	June 16,	Francis Hilliard.
Parmelee, Asaph	Boston,	" 16,	Isaac Ames.
Piper, John W. (5)	Fitchburg,	" 10,	Wm. W. Rice.
Pratt, Joshua G.	Deerfield,	" 10,	Charles Mattoon.
Quimby, Moses Quimby, M. G. C. (6)	Grafton,	" 12,	Wm. W. Rice.
Richardson, O. P. (7)	Worcester,	" 14,	Wm. W. Rice.
Ricker, Charles E.	Boston,	" 16,	Isaac Ames.
Spaulding, Amos P.	Westminster,	" 14,	Wm. W. Rice.
Street, E. L. (7)	Worcester,	" 14,	Wm. W. Rice.
Sweetser, Thomas H.	Reading,	" 19,	L. J. Fletcher.
Thayer, Alden, Jr.	Worcester,	" 29,	Wm. W. Rice.
Trask, George K.	Fitchburg,	" 4,	Wm. W. Rice.
True, Jacob	Amesbury,	" 29,	Henry B. Fernald.
Ulmer, Philip	Lawrence,	" 17,	Henry B. Fernald.
Waterman, Ansel H.	Brookline,	" 14,	Francis Hilliard
Ware, Benjamin B. (3)	Wrentham,	April 30,	Francis Hilliard.
Whitman, J. M. & J. (8)	Westminster,	June 5,	Wm. W. Rice.
Wilder, Josephus	Clinton,	" 15,	Wm. W. Rice.

(1) Blake, Barnard & Co., Boston.
(2) Orcutt & Peck, Brookline.
(3) Bowles & Blood, Worcester.
(4) "In the firm of E. P. Williams & Co."
(5) Ware & Drake, Mansfield.
(6) Firm not stated, Westboro'.
(7) Lowe & Piper, Fitchburg.
(8) Moses Quimby & Son, Grafton.
(9) Worcester Shuttle Company.
(10) J. M. & J. Whitman, Westminster.